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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 208

J. A. HERZOG, *Petitioner*,

v.

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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J. A. HERZOG, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 29, 1956.

### OPINIONS BELOW

The opinion of Mr. Justice Douglas granting bail pending appeal is reported at 99 L. Ed. 1299 and 75 S. Ct. 349. The opinion of the court below on the

original hearing (Appendix A, pp. A1-A13)[1] is reported at 226 F. 2d 561. The opinion of the court below on the rehearing en banc and the dissenting and concurring opinions then rendered (Appendix B, pp. A14-A28) have not yet been reported.

## JURISDICTION

The judgment of the court of appeals following the original hearing (Appendix C, p. A29) was entered on October 11, 1955. The orders granting a limited rehearing en banc (Appendix C, pp. A30-A31) were entered on November 21, 1955. The judgment of the court of appeals following the rehearing en banc (Appendix C, pp. A31-A32) was entered on May 29, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether, when key prosecution witnesses who have already been impeached by prior written self-contradictions are shown to have testified before the grand jury that returned the indictment, and the defendant then makes request for inspection of their grand jury testimony which appears to be in narrow compass, the trial judge may summarily deny the request without himself examining the grand jury testimony in question, on the ground that such testimony has not been shown to be impeaching.

2. Whether, where a vital issue in a prosecution for alleged income tax evasion is whether dealers buying

[1] Inasmuch as the appendix materials are somewhat more voluminous than usual, we have, pursuant to the provisions of the second subparagraph of Rule 23(1)(i), caused the Appendices to this petition to be separately bound.

used cars made payments of "side money" in connection with their purchases that were not recorded on the seller's invoices, it is proper to exclude, on the sole ground of immateriality, evidence of market value of used cars appearing in publications recognized in the trade, where such evidence demonstrates that the seller's invoice prices were far closer to the recorded market value than were the prices of invoice-plus-side-money testified to by the buyers as having been paid by them.

3. Whether the divergent rulings of the court below in this case and in *Bloch* v. *United States*, 221 F. 2d 786, rehearing denied, 223 F. 2d 297, amount, in view of the demonstrable identity between the two cases, to such a denial of equal justice as to call for an exercise of this Court's power of supervision.

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The last question may be stated with somewhat more particularity as follows:

3. Whether, in two cases that both involve the same factors—prosecutions for income tax evasion; an erroneous instruction, not objected to at the trial, that defined willfulness in terms of careless disregard of the right to act; and additional and similar "curative" instructions—a court of appeals may, without review by this Court in the exercise of its supervisory jurisdiction, reverse the conviction where there are more "curative" instructions, and where the jury is told that mistakes and negligence do not entail criminal liability (*Bloch* v. *United States*, 221 F. 2d 786, rehearing denied, 223 F. 2d 297), and yet affirm the conviction where there are fewer and less explicit "curative" instructions, where an instruction that an honest error

due to carelessness will not support a finding of willfulness is refused, and where the erroneous instruction deals with an issue of deliberateness-versus-negligence that affects seventy per cent of the allegedly understated income for the sole conviction count, which issue was hotly contested throughout an entire three weeks trial (this case).

## STATUTE AND RULES OF COURT INVOLVED

1. Section 145(b) of the Internal Revenue Code of 1939 is as follows:

**"§ 145. Penalties.**

* * * * *

**"(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

2. Rule 6(e) of the Federal Rules of Criminal Procedure is as follows:

**"Rule 6. The Grand Jury.**

* * * * *

**"(e) Secrecy of Proceedings and Disclosure.** Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties.

Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

3. Rule 30 of the Federal Rules of Criminal Procedure is as follows:

**"Rule 30. Instructions.**

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

4. Rule 52 of the Federal Rules of Criminal Procedure is as follows:

> **"Rule 52. Harmless Error and Plain Error.**
>
> **"(a) Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial right shall be disregarded.
>
> **"(b) Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

## STATEMENT

In view of the limited number of issues presented by the present petition, only those facts now relevant are set forth here.

Petitioner was indicted on March 9, 1954, on three counts under Section 145(b) of the Internal Revenue Code of 1939 (*supra*, p. 4) for attempting to defeat and evade a large part of the income tax owed by himself and his wife Barbara Herzog for the years 1947 and 1948. The indictment alleged that the offense was committed by means of filing false and fraudulent returns for each year, in which it was stated that the net income and tax were as set forth in the following table, whereas the indictment alleged that the correct income and tax were as follows (R. 3-5):

| | Count 1 (J. A. Herzog, 1947) | Count 2 (Barbara Herzog, 1947) | Count 3 (J. A. and Barbara Herzog, 1948) |
|---|---|---|---|
| Net income per indictment ..... | $79,156.65 | $79,156.66 | $88,013.19 |
| Net income per return ..... | 59,166.92 | 59,166.93 | 78,067.17 |
| Alleged understatement of income | 19,989.73 | 19,989.73 | 9,946.02 |
| Tax per indictment ..... | 45,125.12 | 45,125.12 | 37,188.85 |
| Tax per return ..... | 30,733.00 | 30,733.01 | 31,383.27 |
| Alleged tax deficiency ..... | $14,392.12 | $14,392.11 | $ 5,805.58 |

The trial commenced on September 27, 1954, and continued for three weeks. The case was submitted to the jury on October 14, 1954, at approximately 2:25 P. M. (R. 1716) and on the following day at approximately 10:00 A. M. (R. 1717) the jury returned its verdict of not guilty on Counts 1 and 2 and of guilty on Count 3.

**A. The basic facts.**

Petitioner has been engaged in the automobile business during practically his entire adult life, and, from 1934 until shortly before the trial in 1954, he operated a Pontiac new car agency in San Francisco (R. 1300).[2] The alleged evasion of tax related entirely to the income from the sale of new and used automobiles in that business. The uncontradicted evidence shows that petitioner because of indifferent health did not devote much time to the business in 1947 or 1948; that he was completely absent from the office for extended periods, such as the entire summer vacation; and that even when on the scene usually devoted only a few hours each week to the business of the automobile agency (R. 1303-1308).

In his absence, the business was run by the Sales Manager, Ansel Douglass, whose name was shown

[2] The statement in the original opinion (Appendix A, p. A1), that petitioner's "principal business appears to have been the wholesaling of used cars to other used car dealers," repeated in the prevailing opinion on rehearing (Appendix B, p. A19), "His principal business was the sale of used cars at wholesale to used car dealers," is not correct. Petitioner's principal business was selling new Pontiac cars (R. 1300). The used cars he sold were those given as trade-ins by the purchasers of the new cars (R. 1815). Thus, in 1947, he sold 428 new cars as against 248 used cars, and in 1948 he sold 400 new cars and 102 used ones (Ex. AB for id., pp. 11 and 12; R. 1806-1807).

jointly with petitioner's on the factory franchise because of the insistence of the Pontiac factory representatives that there must be someone in authority with whom they could deal during petitioner's prolonged absences from the business (R. 1308-1309, 1043-1044).

Until December 1947, the office was in charge of the Office Manager, Phil Smith. At that time, petitioner discovered that Smith had been embezzling substantial sums from the business over an extended period, the embezzlement running in excess of $50,000 during the period January-November 1947. After Smith's dismissal, and in the early part of 1948, a new office manager was employed. (R. 1309-1311, 1324-1329, 1280.)

**B. The prosecution's case.**

The pattern of tax evasion which the prosecution contended throughout the trial had been employed by petitioner during the years 1947 and 1948 was the same for both years. The only significant difference was that 1947, as to which there was an acquittal, involved a much larger sum—$39,979.46 in alleged unreported income, as against $9,946.02 in 1948—and by far the greater bulk of the prosecution's evidence related to the 1947 counts, 1 and 2, as to which, as has been indicated, petitioner was acquitted.

The principal contention of the prosecution was that in the sale of used cars at wholesale to used car dealers petitioner collected, in addition to the price appearing on the invoice or sales order, "side money" in cash, principally through his Sales Manager, Douglass, and his Assistant Sales Manager, Maitland Cline. The prosecution also contended that in some sales of new automobiles without a trade-in, "side money" was similarly collected from the purchasers and delivered

to petitioner. The prosecution's evidence involved two such instances in 1947 and two in 1948.

Another design in the alleged "pattern" of evasion had to do with petitioner's failure to report the profit derived from the sale of so-called "house" or "executive" cars. These were new cars, registered in petitioner's name personally, used by him and the agency for several months, and then sold. Petitioner conceded that the profit from the sale of these cars, of which there were eleven for the conviction year 1948, had not been properly reported, but contended that those cars were directly involved in the manipulations and embezzlement of Smith, the Office Manager, and that the failure to report these transactions on the tax returns was unintentional, inadvertent, and due to the confusion resulting from Smith's embezzlement. See p. 29, note 14, *infra*, for the details.

The prosecution established, through its own exhibit (Pl. Ex. 197, R. 1792), that the actual unreported profit attributable to the 11 house cars sold in 1948 was $8,550.46. Elimination of $1,589.43 as one-half of the actual profit on 3 of these cars entitled to capital gains treatment because held for more than six months,[3] leaves a taxable profit on the 1948 house cars of $6,961.03. Inasmuch as Count 3 of the indictment averred that petitioner's entire unreported income for 1948 was $9,946.02 (R. 5), the house cars thus accounted for almost 70 percent of the conviction income.

Finally, the prosecution sought to establish that a few old automobiles, offered as trade-ins, had been omitted from the record of the agency's transactions.

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[3] See Pl. Ex. 180, R. 1778, and Pl. Ex. 197, R. 1792, for the dates of acquisition and sale.

Petitioner contended that these transactions were "clean-up deals" and that if the automobile salesmen happened to realize more than the trade-in allowance, it was profit to them personally, and that the realization of such a profit, if any, was without the petitioner's knowledge or consent (R. 1340-1345). The prosecution's tax expert conceded that these transactions involved taxable income only if and to the extent that petitioner received more than had been allowed on the trade-in (R. 1203-1206).

Such was the "pattern" of evasion presented by the prosecution in the trial of the case. Petitioner, to meet this accusation, and in support of his own testimony that he did not conceal any of his income (R. 1316, 1318, 1321, 1323-1324, 1347, 1353-1354), tendered several types of evidence, only two of which are involved in the present posture of the case.

**C. The trial judge's refusal to inspect or to permit inspection of the grand jury testimony of already impeached prosecution witnesses.**

Petitioner's former employees, Douglass and Cline, testified at the trial as prosecution witnesses and stated in substance that they had collected side money from customers and had turned all such money over to petitioner, either directly or through the Office Manager, Smith. They denied that they had ever received any such money for themselves. Evidence to the contrary was given by Charles Willis, a long-time personal friend of both, who testified that during social visits with them in 1947 and 1948 Cline told him that he and Douglass were making money on the side and splitting it (R. 1240, 1246), and that, in 1949, when he was working under Douglass, the latter told him he had cash which he wanted to change into small denominations.

and funds he wanted to invest, without disclosing that the money was his (R. 1240-1243, 1246-1252).

During the cross-examination of Douglass and Cline, petitioner requested that pretrial statements made by both to the Treasury Department and their testimony before the grand jury be made available to him for inspection for possible impeachment purposes (R. 1072, 1089-1090, 1174-1175). Although the district judge stated that he saw no legal basis for either type of request (R. 1173-1174), the prosecution voluntarily handed over to petitioner's counsel the written sworn statements made by Douglass and Cline to Treasury Department agents in 1952 (R. 1072, 1174).

The trial testimony of both witnesses was impeached by those statements, which differed in material respects, on petitioner's theory of the case, from what they said on the stand.[4] Upon establishing that both Douglass and Cline had testified before the grand jury that had returned the indictment, petitioner renewed his motion to examine their grand jury testimony (R. 1089, 1174-1175). The district judge summarily denied the request without examining the grand jury testimony himself (*ibid.*).

The basis for the judge's ruling was that there was no authority for permitting such inspection in the absence of "some showing of an extraordinary nature" (R. 1072), that he had "never heard of such a thing, not in the federal court" (R. 1090), and that as a prerequisite to such inspection petitioner's counsel would "have to make some showing that it would be impeaching, otherwise it is a fishing expedition and

[4] Petitioner's view of the materiality of these differences is set forth in Appendix D, pp. A33-A36.

would delay every criminal proceeding in federal court. Never would have an end to these proceedings" (R. 1090). When petitioner's counsel then said (*ibid.*), "I don't believe it would take more than ten or fifteen minutes for us to read the testimony," the judge's reply was, "Well, I will deny the application." The prosecutor did not urge that the grand jury testimony of the witnesses in question was lengthy, or that inspection would unduly delay the trial; his sole ground of objection was that "the 'efense has failed to lay a proper foundation for turning over, at least, the grand jury testimony" (R. 1072).

**D. The trial judge's exclusion of evidence of market value.**

The second offer (Ex. AC for id.; not printed) consisted of contemporary bi-monthly issues of the "Kelley Blue Book", a trade journal that showed the average wholesale and retail selling price of every type of automobile. These were described by a prosecution witness as a compilation of market values prepared from reports submitted by an advisory board of about 200 members (R. 195-196). The Kelley Blue Books were, according to the well-nigh unanimous testimony of the prosecution witnesses, universally recognized and accepted in the trade as reliable guides to used car values (R. 195, 596, 678, 701, 924, 1004, 1817, 1819, 1839).

In the aggregate, petitioner's sale prices were in substantial accord with the Kelley Blue Book price. A total of 42 used car sales were involved in the prosecution's proof of "side money" in 1948, of which 35 were sold to Joe Angel. An analysis of these 35 (Ex. AB for id., p. 4; R. 1799) showed a total invoice sale price on petitioner's books of $34,720, compared with a $35,785 total sales value established by the cur-

rent Kelley Blue Books,[5] as against a total price of $39,245 which Angel claimed he paid. Thus, in the aggregate, petitioner's recorded sales prices were in substantial accord with Kelley Blue Book prices. But the trial judge rejected petitioner's proffer, and specifically rested his ruling of exclusion on a lack of materiality and not on any deficiency in foundation (R. 1492-1498, 1521-1522). He said (R. 1498), "I see no basis whatsoever for the introduction of these blue books." At the close of all the offers, this colloquy took place (R. 1521):

> "Mr. Avakian: Very well. For the record, your Honor, so that I may not be caught short on having properly laid the foundation, if there is any question as to the fact that various documents which have been mentioned as the source of the information on these exhibits are not in evidence, if that is any basis of the ruling, I would like to offer them, although I hate to clutter up the record with a lot of markings.
>
> The Court: I understand your point, Mr. Avakian, and I will protect the record on that and state that the basis of the ruling has nothing to do with the laying of the foundation as to any document whatsoever. It is based on materiality."

**E. The charge on willfulness.**

The charge dealing with the kind of intent necessary to convict petitioner of willfully attempting to avoid his income tax was as follows (R. 1703-1704):

> "Now, when we use the term 'Wilful' in speaking of a violation of this statute, as used in this

[5] The Kelley Blue Book called for reduction of the price by the estimate of reconditioning cost, but petitioner sold used cars at wholesale as is, without reconditioning (R. 1367-1369; see also R. 1046-1048).

> criminal statute and as used in most criminal statutes, we mean an act done with a bad purpose, without justifiable excuse, or stubbornly or obstinately or perversely. It may be used to characterize an act done without grounds for believing it is lawful, or conduct marked with completely careless disregard of whether one has a right to do that or not."

No objection was made at the trial to this portion of the charge.

**F. The first appellate stage.**

Applications on petitioner's behalf for bail pending appeal were successively denied by the trial judge and by the court below, after which bail was granted by Mr. Justice Douglas (99 L. Ed. 1299; 75 S. Ct. 349) on the ground that petitioner's "request for inspection of the grand jury minutes would have been treated differently in New York than it was in California," and that how such a matter should be handled "is a considerable question in the administration of justice."

Petitioner's reply brief on appeal was filed on April 12, 1955. Just the day before, one division of the court below (Bone and Pope, Circuit Judges; Murray, District Judge) had, in *Bloch* v. *United States*, 221 F. 2d 786 (Appendix E(1), pp. A37-A45) held that a charge on willfulness in a § 145(b) case which was virtually *in haec verba* with the charge on that point in this case, and which was likewise not objected to at the trial, was fatally erroneous, and could be reached by appellate court notwithstanding the failure to object below.[6] At the original argument in the court below, on April 19, 1955, petitioner called the *Bloch* case to

[6] The relevant portions of the charge in the two cases are set forth in the chart following p. 32 *infra*.

the attention of the different division hearing this case (Mathews and Chambers, Circuit Judges; Byrne, District Judge), and, pursuant to the suggestion of the presiding judge, filed a supplemental memorandum on the question of the asserted similarity of the two cases; the Government filed a memorandum in reply.

Nearly six months later, on October 11, 1955, the judgment of conviction was affirmed (Appendix A, pp. A1-A13). On the issue of the grand jury minutes, the court held that the trial judge was not required to inspect those minutes himself in the absence of a specific request that he do so, and, further, that a defendant may neither see nor request the trial judge to examine grand jury minutes for purposes of impeachment until he can first show that those minutes will be impeaching (pp. A5-A7). On the issue of the Kelley Blue Books, the court held that those books were properly excluded, in part on grounds suggesting that an insufficient foundation was laid for their admission, in part on grounds suggesting that they had no probative value (pp. A2-A3).

On the issue of the *Bloch* case, the court held that this decision, 221 F. 2d 786; April 11, 1955, rehearing denied, 223 F. 2d 297; June 14, 1955 [Appendix E(2), pp. A46-A48], was overruled *sub silentio* by *Brown* v. *United States*, 222 F. 2d 293; April 14, 1955, a decision rendered by still a third division of the court below (Stephens and Fee, Circuit Judges; Wiig, District Judge), and moreover went on to hold that, under Rule 52(b), F. R. Crim. P., an appellate court had no power to consider any objection to a charge not made at the trial (pp. A7-A13).

**G. The second appellate stage.**

Petitioner promptly filed a petition for rehearing, on each of the three points set out above, abandoning all other issues.[7] The panel that heard the original argument then ordered a rehearing "limited to questions pertinent to the conflict or apparent conflict between the decision rendered herein on October 11, 1955, and the decision of this court in Bloch v. United States, 221 F. 2d 786 (rehearing denied 223 F. 2d 297)", and advised the Chief Judge "that the members of the court participating in the decision of October 11, 1955, are of the opinion that the case should be reheard en banc, limited as above indicated." The full court accordingly entered an order for a rehearing en banc thus limited. The text of both orders is set out in Appendix C, at pp. A30-A31.

The case was reargued en banc on December 13, 1955, and decided on May 29, 1956 (Appendix B, pp. A14-A28). The majority of the court, speaking through Judge Healy, determined that the construction of Criminal Rule 52(b) by the original panel was erroneous, but held that "a reading of the instructions as a whole, plus an examination of the evidence pertinent to the matters being reheard, leaves us with no belief or apprehension that the giving of the willfulness charge may have resulted in a miscarriage of justice or in the denial to appellant of a fair trial" (p. A20). It accordingly affirmed the judgment of conviction.

Judge Stephens dissented (pp. A23-A27) "upon the ground that neither this court nor any member

[7] A copy of the petition for rehearing is included in the record as certified by the clerk of the court below, and nine other copies have been lodged with the Clerk of this Court, along with nine other copies of the record as printed for the use of the court below.

thereof has any jurisdiction to consider and pass upon but one single issue of a case in which other issues are involved on appeal to this court."

Chief Judge Denman concurred (pp. A20-A22) on the ground that "the court in banc has this same power to limit the issues to be reviewed as the Supreme Court has on certiorari."

Judge Chambers concurred in the affirmance of the judgment of conviction, but dissented as to the construction of Criminal Rule 52(b) (pp. A22-A23). Judge Fee wrote a separate opinion dissenting from the majority's construction of the Criminal Rules (pp. A27-A28).

## REASONS FOR GRANTING THE WRIT

In this case, after denying petitioner bail pending appeal because in its view no substantial question was involved, the court below required over thirteen months, as well as a rehearing en banc before nine judges, to arrive at a final decision. This unusual circumstance suggests on its face that further scrutiny of the proceedings is in order, a view that is confirmed by examination of the significant substantive issues that are brought forward in the present petition.

*First.* As the Circuit Justice said (99 L. Ed. at 1303; 75 S. Ct. at 353), the problem of how to deal with a request for inspection of grand jury minutes for the purpose of impeaching a trial witness who previously appeared before the grand jury "is a considerable question in the administration of justice."

The stock reasons for secrecy of grand jury proceedings—protection of grand jurors, witnesses and complainants; protection of those unjustly accused;

safeguarding of the jury's deliberations so that grand jurors will be without fear that their conduct will be disclosed elsewhere (*Goodman* v. *United States*, 108 F. 2d 516, 519 (C. A. 9); *United States* v. *Smyth*, 104 F. Supp. 283, 303, note 85 (N. D. Calif.))—cease completely after the indictment has been returned, and when the only question is whether one who testified before the grand jury has changed his testimony at the trial. Consequently the veil of secrecy also lifts, at least to the extent of requiring the trial judge to examine the grand jury testimony for contradictions. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234; *United States* v. *Alper*, 156 F. 2d 222, 226 (C. A. 2); *United States* v. *Byoir*, 147 F. 2d 336, 337 (C. A. 5); *In re Bullock*, 103 F. Supp. 639, 643 (D. D. C.); *United States* v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (D. N. J.).

The cases cited turn on whether the ends of justice require disclosure, and while some of them antedate the adoption of the Criminal Rules, disclosure under the circumstances stated is consistent with Criminal Rule 6(e), *supra*, at p. 5, which permits such a step "in connection with a judicial proceeding." Moreover, disclosure in those circumstances is likewise consistent with the rule of *Gordon* v. *United States*, 344 U.S. 414, 419, which holds that an accused is entitled as of right to inspection of the pre-trial statements of government witnesses.

The only questions that then remain are as to the kind of a foundation that must be laid to support a request for inspection, and as to the nature of the request for inspection that must be made.

The trial judge (R. 1090) and the court below (Appendix A, pp. A6-A7) both held that, as a prerequisite to inspection of any kind, whether by counsel

or by court, petitioner had to make a showing that the grand jury testimony would be impeaching before it could be examined to see whether it was. This, plainly, establishes a condition for examination that is impossible of attainment; such a requirement cannot reasonably be imposed in respect of an unseen document. And so most other courts that have considered the problem have held that, since the necessary foundation questions for impeachment could not be asked as to an unknown document, it was proper to request inspection. *United States* v. *Krulewitch*, 145 F. 2d 76, 79 (C. A. 2); *United States* v. *Cohen*, 145 F. 2d 82, 92 (C. A. 2); *United States* v. *Mesarosh*, 116 F. Supp. 345, 350 (W. D. Pa.) ("Defendants cannot show that the reports contradict the witness unless they see them.").[7a]

The last question is whether the request for inspection fails because it was one for inspection by counsel instead of a request that the judge make the inspection himself. The court below so held (pp. A6-A7), a ruling that is contrary to the practice elsewhere. See *United States* v. *Alper*, 156 F. 2d 222, 226 (C. A. 2); *United States* v. *Cotter*, 60 F. 2d 689, 692 (C. A. 2) (request for general inspection of grand jury minutes was refused, but trial judge "went over them himself, decided what parts were relevant, and laid so much open"). The same treatment is accorded requests for inspection of F.B.I. reports in the Second and Fifth Circuits. *United States* v. *Lebron*, 222 F. 2d 531, 536-537 (C. A. 2), certiorari denied, 350 U.S. 876; *Shelton* v. *United States*, 205 F. 2d 806, 814 (C. A. 5).

[7a] The suggestion in *Scanlon* v. *United States*, 223 F. 2d 382, 385-386 (C. A. 1), that the required foundation in cases of this character is an admission by the witness that he has previously made inconsistent statements, would appear to require self-impeachment by the witness as a prerequisite to the adverse party's effort to impeach him by self-contradiction.

Here, after defense counsel's assertion that the grand jury testimony lay in small compass (R. 1090) was not challenged by the prosecution, the trial judge was bound to examine that testimony to see whether it in fact contradicted what the witness had said from the stand. Since the judge's refusal was based on a broad (but unsound) statement of law—"I never heard of such a thing, not in the federal court" (R. 1090); (see also R. 1072, 1089-1090)—nothing can properly turn on the precise form of the request for inspection. The ruling below, which appears to rest on that point (pp. A6-A7), is accordingly in conflict not only with those in other circuits, but, we submit, contrary to good sense and fundamental fairness as well.

The points dealing with the grand jury minutes were reasserted in the petition for rehearing (Pet. Reh. 9-10), but were excluded by the court below from the matters reheard en banc.

*Second.* The basic issue of fact in respect to thirty per cent of the allegedly understated income for the conviction year (see *supra*, p. 9) was whether side payments in cash were made to petitioner by the prosecution witnesses who purchased used cars from him. See R. 1560, 1705-1706. Petitioner established on cross-examination of many of these witnesses that, if they made side payments in the amounts testified to by them, they were either making no profits on the resales or else were actually taking losses thereon (R. 187, 203, 219-221, 244, 259, 609, 632, 636). Consequently, if the original purchases at invoice prices plus alleged side payments were substantially over the market and hence unprofitable (as distinguished from small commissions[8] or small side payments to peti-

[8] A good many of the alleged side payments were recorded in one witness's books as "commissions" (R. 143, 205, 206, 235-236, 241-242, 260-261).

tioner's employees[9]), then it would be a fair inference that the large side payments testified to were not in fact made, and that the used car dealers were relying on such alleged payments to reduce their apparent profits and their consequent tax liability.[10]

A fair test of the probability of the used car dealers' stories, therefore, was whether their alleged costs, with large side payments included, were at or near the market price; because, obviously, it would be improbable that they willingly engaged in unprofitable transactions. And so petitioner offered the Kelley Blue Books (Exh. AC for id.) which showed that it was petitioner who was more likely to be telling the truth. For the figures, see pp. 12-13, *supra*.

The trial judge's exclusion of petitioner's evidence of market value was rested entirely on his view that such evidence was utterly immaterial (R. 1498, 1521, quoted *supra*, p. 13). He was sustained in his refusal by the court below on the grounds going to the relevance, the weight, and the foundation laid for, the proffered evidence.

Every other federal court that has considered this question has held evidence of market value relevant in those circumstances. *United States* v. *Werner*, 160 F. 2d 438 (C. A. 2); *Wolcher* v. *United States*,

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[9] Cline's original statement to the Treasury agents was that the cash payments ran between $25 and $50 per car (R. 1175).

[10] A San Francisco used car dealer who understated his income by recording fictitious side payments on his books as an element of cost was convicted of tax evasion only a few months before petitioner was indicted on the view that the side payments in his case had actually been made. *United States* v. *E. E. R. Shapiro*, N. D. Calif., No. 33523; indictment filed March 13, 1953; trial 4-20 January 1954; sentence, February 5, 1954.

200 F. 2d 493, 498-499 (C. A. 9). And, certainly in the absence of other evidence of market value, the Kelley Blue Books were competent evidence. See *Charles Hughes & Co.* v. *SEC*, 139 F. 2d 434, 438 (C. A. 2). The issue at the trial was competence, not weight. Moreover, when a trial judge states (R. 1521), "I will protect the record on that, and state that the basis of the ruling has nothing to do with the laying of a foundation as to any document whatsoever," it simply is not open to an appellate court, as this one did (p. A2), to sustain his ruling on any ground going to a lack of foundation. The conclusion is therefore inescapable that petitioner was dealt with to his prejudice, on grounds at variance with the rules applied in other circuits.

This point, likewise, though duly reasserted in the Petition for Rehearing (Pet. Reh. 8-9), was excluded by the court below from the scope of the reargument.

*Third.* The present case was in no sense open and shut. The fact that the jury deliberated overnight, and finally came in on the second day with a split verdict that convicted petitioner only on the smallest count of the indictment, establishes well-nigh conclusively that the case was actually a very close one, particularly since the evidence on which petitioner was convicted was of the same character and established the same alleged course of conduct as that on which he was acquitted. Moreover, there were more witnesses and quantitatively more evidence against petitioner on the acquittal counts than on the count that resulted in conviction.

In that setting, the error of excluding market value, which would have enabled the jury to determine whether petitioner or the witnesses against him were

more likely to be telling the truth, and the error of denying petitioner the right to impeach through the use of grand jury testimony the already impeached witnesses Cline and Douglass, loom large indeed. (We set forth in Appendix D, pp. A33-A36, in order not to lengthen unduly the body of this Petition, the significant respects in which those witnesses had already been contradicted by their own prior inconsistent statements.)

This is therefore not a situation where the evidence against petitioner was in any sense compelling or overwhelming; the jury's verdict establishes precisely the contrary. Nor is petitioner seeking to extract from episodes in isolation abstract questions of evidence and procedure. These were matters of substance. And, since "one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." So spoke this Court in *Kotteakos* v. *United States*, 328 U.S. 750, 765. Under that standard, resolution in petitioner's favor of the first two issues now raised would require reversal.

*Fourth.* The most disturbing feature of this case, however, is that the court below, on virtually identical records, applied one rule in *Bloch* v. *United States*, 221 F. 2d 786, rehearing denied, 223 F. 2d 297 (Appendix E, pp. A37-A48) and another in this case.

1. The original basis for this diversity (Appendix A, pp. A1-A13) was the view, first that *Brown* v. *United States*, 222 F. 2d 293, decided by one division on April 14, 1955, "overrules *sub silentio* the *Bloch* case," decided by another division three days earlier—even though *Bloch* was reaffirmed, two months after *Brown*, by the denial of the Government's petition for rehearing, 223 F. 2d 297 (June 14, 1955); and, second, that an appellate court has no power under Criminal Rule 52(b) to reach the merit of any instruction that is not objected to under Criminal Rule 30 (pp. A7-A13). The first ground is, literally, fantastic; the second is contrary to the rulings of eight other circuits, to other expressions in the court below, to the interpretation placed on the Rules by the Rules Committee, and to the nearest applicable decision here.[11] The

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[11] A. No less than eight circuits have held that failure to object under Criminal Rule 30 is no bar to the invocation of Criminal Rule 52(b) by the appellate court.

*First Circuit:* *Daigle* v. *United States*, 181 F. 2d 311, 313; *Lash* v. *United States*, 221 F. 2d 237, 240, certiorari denied, 350 U.S. 826.

*Third Circuit:* *United States* v. *Cumberland*, 200 F. 2d 609; *United States* v. *Ward*, 168 F. 2d 226, 228.

*Fifth Circuit:* *Feutralle* v. *United States*, 209 F. 2d 159, 163-164 (*semble*).

*Sixth Circuit:* *Lazarov* v. *United States*, 225 F. 2d 319, 329, certiorari denied, 350 U.S. 886.

*Seventh Circuit:* *United States* v. *Vasen*, 222 F. 2d 3, 5-6, certiorari denied, 350 U.S. 834; *United States* v. *Raub*, 177 F. 2d 312, 315.

*Eighth Circuit:* *Mitchell* v. *United States*, 208 F. 2d 854, 857-858, certiorari denied, 347 U.S. 1012.

*Tenth Circuit:* *Apodaca* v. *United States*, 188 F. 2d 932, 937.

*District of Columbia Circuit:* *Robertson* v. *United States*, 171 F. 2d 345.

B. Other cases in the court below were to the same effect. *Remmer* v. *United States*, 205 F. 2d 277, 290, note 16 (further pro-

result of the opinion on rehearing (Appendix B, pp. A14-A28) is that the first basis for sustaining petitioner's conviction has now been solemnly declared to have been untenable.

2. As the chart following page 32 demonstrates, the critical instruction—willfulness includes careless disregard—was the same in both cases, being virtually identical word for word. The further instructions on which the court relied in this case to hold that the erroneous definition of willfulness was not prejudicial (pp. A18-A19), were also present in *Bloch*, and were particularly relied upon by the Government there as a ground for its Petition for Rehearing; see pp. 5-6 thereof, note 1. Moreover, there were more "curative" instructions in *Bloch*, see chart, and in *Bloch* the jury was specifically told—as the jury here was not—that "The criminal law does not punish innocent mistakes, inadvertent errors, or mere negligence". Indeed a similar instruction was refused here.[12] If, then, one

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ceedings, on other grounds, 347 U.S. 227, and 350 U.S. 377); *Jones* v. *United States*, 175 F. 2d 544.

C. The Rules Committee's notes show that it was intended by Criminal Rule 52(b) to enlarge the power of the appellate tribunal: "The concept of plain error has served to relieve the harshness of the general rule that an appellate court will not consider alleged errors to which objection and exception were not interposed at the trial." *Preliminary Draft, Federal Rules of Criminal Procedure* (May 1943), p. 198; *Second Draft, Federal Rules of Criminal Procedure* (February 1944), p. 186.

D. Shortly after the adoption of the Criminal Rules, this Court cited Rule 52(b) to reach and reverse for an erroneous instruction to which no exception had been taken at the trial. *United Brotherhood* v. *United States*, 330 U.S. 395, 411-412.

[12] Petitioner requested two instructions dealing with the issue of intent.

His requested instruction No. 18 was (R. 25-26):

"Before the defendant in this case can be found guilty of the alleged charge set forth in the indictment, it must be established,

erroneous instruction on a critical issue is to be deemed cured by a further correct instruction on the same issue, under the guise of "examining the charge as whole".

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by the evidence, to a moral certainty and beyond a reasonable doubt that the defendant had the specific intent to commit the acts therein alleged.

"If, in your judgment as jurors, the prosecution fails to prove such specific intent to a moral certainty and beyond a reasonable doubt as to the defendant in this case, or if after considering all the evidence you or any of you entertain a reasonable doubt as to whether the defendant in this case had such specific intent, then you must return a verdict finding the defendant not guilty."

His requested instruction No. 19 read (R. 26):

"The mere failure to pay the tax legally due (if you find such failure existed), or the mere filing of an incorrect return (if you find such was done), is not enough to convict the defendant. In addition, before you can hold him guilty, you must also find to a moral certainty and beyond every reasonable doubt that any such act or omission was done purposely in bad faith and with intent to evade tax.

"In other words, the gist of the offense is an act done with a fraudulent purpose. An honest error, whether due to incompetence of bookkeepers or to carelessness or ignorance on the part of the defendant or to some other cause, would not support a finding of wilfullness. Good faith is a complete defense to the charge alleged in the indictment."

Nothing even remotely similar to any of the foregoing was included in the charge (R. 1691-1706), in consequence of which petitioner's counsel excepted as follows (R. 1711):

> "The next is Defendant's requested Instruction No. 18. And if I may group these for the purpose of stating the ground, I would also take exception to the failure to give No. 19, both of them dealing with the matter of intent and wilfulness.
>
> "At least one category of evidence in this case, and possibly two, involve situations in which the Jury may find there was unreported income, which would make it particularly important for them to distinguish between a finding of deficiency and a finding that the failure to pay the tax on that money was due to specific intent to evade."

Failure to give requested instructions 18 and 19 was duly assigned as error. Point 12(e), R. 1727-1728.

hen the Government's Petition for Rehearing in *Bloch* should have been granted. In fact, it was denied; the incorrectness of the instructions was reaffirmed; and Bloch's conviction remained reversed (223 F. 2d 297; Appendix E, pp. A46-A48). Yet here, where the charge as a whole was not nearly as favorable to the defendant on a critical issue that covered 70 per cent of the conviction year's allegedly unreported income, the instructions as a whole were approved; and petitioner's conviction affirmed.

3. The critical sentence, which advised the jury (R. 1703-1704) that the term "willful" in the context of § 145(b) "may be used to characterize an act done without grounds for believing it lawful, or conduct marked with completely careless disregard of whether one has a right to do that or not," was taken from the recital of a variety of definitions of the same word set forth in *United States* v. *Murdock*, 290 U.S. 389, 394. But the holding of the *Murdock* case establishes that this particular definition was specifically rejected; the court there said at 396:

> "Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct."

There can be no doubt, therefore, that the basic instruction both here and in *Bloch* was fatally erroneous.[13]

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[13] The comment of the court below (Appendix B, p. A18)—"The recital in *Murdock*, however, would hardly seem a safe guide to follow in the formulation of instructions in all income tax evasion cases"—is surely a masterful understatement.

4. The two cases cannot fairly be distiguished on their facts.

(a) The reliance of the court below (Appendix B, p. A16) on the Government's confession of error in its *Bloch* petition for rehearing overlooks the circumstance that, while the Government acquiesced in the reversal, it petitioned for rehearing in order to modify the holding that the instruction was erroneous, and that it considered this question sufficiently important to have the petition signed by the Assistant Attorney General in charge of the Tax Division. In order that there may be no doubt as to the Government's position in the *Bloch* case, we have attached hereto, following Appendix E, p. A48, a facsimile copy of the petition for rehearing in that case.

(b) Nor is the court below on sounder ground in characterizing the side payment issue as the major one and on that basis deeming the instruction on willfulness to be "at worst innocuous."

The question of side payments *vel non* was the major issue at the trial, true enough, but on the appeal, which dealt only with the count on which petitioner was convicted, it was not. As we have already pointed out, pp. 9, 20, *supra*, seventy per cent of the allegedly understated income for the conviction year was attributable to the house cars, and only thirty per cent to alleged side payments.

Thus the major issue on the appeal was inadvertence, with which the instruction now in question dealt. And even at the trial, where the total house car income of $13,000 compared with a total allegedly unreported income in all three counts of about $50,000, it was not at all insignificant, whether relatively or absolutely.

Moreover, the issue of inadvertence had been fully explored throughout the trial, as the references in the margin establish.[14]

The issue of willfulness versus inadvertence, therefore, is no afterthought. It involved about a quarter of the allegedly understated income at the trial, and some seventy per cent of such income on the appeal. To consider, in the face of the uncontrovertible percentages in the record, that the side money question was "the major issue" in the sense that all else can be disregarded—the approach of the court below (Appendix B, p. A19)—is to shut one's eyes to the realities of the present appeal. Indeed, the apparent inconsistency in the jury's verdict can only be reconciled on the footing that the jury disbelieved the prosecution's side money evidence—the major portion of the 1947 counts—and acquitted; while as to the house car transactions—the major portion of the 1948 count—it convicted petitioner under the compulsion of the

[14] (a) The 18 house cars were referred to in the prosecutor's opening statement. R. 52. (b) Benson, a Government witness, testified at length concerning them. R. 972-988. See R. 982 for his testimony as to the amount of profit attributable to all 18 cars. (c) The defense stipulated that the proceeds from the sale of these cars were received but not reported. R. 1177. (d) Defense counsel in his opening admitted receipt of the proceeds and asserted that failure to return those sums as income was due to Smith's peculations. R. 1218-1221. (e) A defense witness reconciled the several exhibits which reflected proceeds from these house cars. R. 1286. (f) Petitioner himself testified at length concerning these transactions (R. 1334-1340, 1432-1439), and on cross-examination conceded that the income from the sale of these 18 cars was not reported (R. 1437). (g) Several exhibits deal with these 18 cars. Pl. Ex. 180, R. 1778; Pl. Ex. 197, R. 1792; Def. Ex. V, R. 1848. (h) The issue of willfulness versus inadvertence in connection with these 18 cars was argued at length in the respective closing arguments. R. 1582-1583 (prosecution opening); R. 1613-1616 (defense); R. 1677 (prosecution rebuttal).

instruction that his carelessness was willful within the meaning of the statute.

5. Accordingly we believe that, in its setting, the willfulness-equals-careless-disregard instruction was plain error and affected petitioner's substantial rights. But the question is not, as the court below thought (Appendix B, p. A20), whether the situation was "extraordinary" or whether the error "may have resulted in a miscarriage of justice". It is rather whether, having reversed in *Bloch* on the basis of an identical instruction that was not objected to at the trial, and having rejected the Government's request to approve the instruction, the same court is now free to apply a different standard of error here and affirm this conviction in the face of the same instruction that was similarly not questioned at the trial, on a state of facts that cannot fairly be distinguished or explained away—except to the extent, see chart following p. 32, that the *Bloch* charge was, by comparison with the charge here, substantially more favorable to the accused.

We submit that, so long as the very concept of law means that persons similarly situated are to be similarly treated, neither the court below—nor any other court—may thus hold the instruction wrong while reversing Bloch's conviction and disregard the identical or worse error in affirming petitioner's.[15]

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[15] One of the dissenting judges wrote (Appendix B, p. A23), "Counsel for Herzog imported the Bloch case here in oral argument over the uncertain bridge of 'It denies Mr. Herzog due process to have the court in Dr. Bloch's case search for plain error and refuse to search for it here.' That argument is nothing more than the old one that 'the policeman didn't arrest two other speeders, so how can he arrest me?'"

We had supposed the contention was that, two speeders having been arrested, both were entitled to equality of treatment in the court before which they were haled.

*Fifth.* This case has disturbing overtones. First the court below denied bail, on the footing that no substantial question was involved, a circumstance that called for an application to the Circuit Justice.

Next, a division of the court below, after nearly six months of deliberation, disposed of the appeal on an untenable construction of the Rules of Criminal Procedure, a construction completely at variance with every other reported case, and now rejected by the court below en banc.

Further, the full court, after more than five months of additional deliberations, has reaffirmed the conviction, without canvassing all the issues involved in the appeal, on grounds that simply do not survive an open-minded examination of the record.

As matters now stand, Bloch's conviction is reversed and this petitioner's is affirmed, in a setting and on an unobjected-to instruction that are identical—except insofar as the charge here, taken as a whole, was plainly more harmful to the defendant than that involved in *Bloch*.[16]

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[16] The court below said, in its first opinion (Appendix A, p. A7), "During oral argument the appellant for the first time objected to the trial judge's charge to the jury on wilfulness." And, again, in its second opinion (Appendix B, p. A16), the court said, "In the cause presently before us the question of the validity of the instruction was first injected by counsel in the course of oral argument on the appeal; and in a supplemental brief filed later the attention of the court was directed to the *Bloch* decision."

The chronology was as follows: Date of first *Bloch* opinion, April 11, 1955; date of filing of petitioner's reply brief in the court below, April 12, 1955; date of first argument of petitioner's case below (R. 1852, not printed), April 19, 1955.

The *Bloch* decision was mentioned in oral argument, but, at the suggestion of the presiding judge, reference thereto was relegated

The present case, then, is preeminently one where the public interest in the even-handed administration of justice calls for an exercise of this Court's supervisory jurisdiction. For if the ruling below stands, then assuredly "Equal Justice Under Law" has become an empty phrase, high-sounding still, but, in its actual application, essentially devoid of content.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the foregoing petition for a writ of certiorari should be granted.

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JUNE 1956.

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to a supplemental brief that was served and filed on the following day, April 20.

Since the *Bloch* decision, on which petitioner relied for questioning the instruction here in question, was hardly available before it was handed down, it is difficult to understand why such a point should be made of counsel's not having "injected" that issue prior to the first argument of petitioner's appeal, only eight days later.

## COMPARISON OF CHAR

### THIS CASE

**1. BASIC INSTRUCTION ON WILLFULNESS**

"Now, when we use the term 'Wilful' in speaking of a violation of this statute, as used in this criminal statute and as used in most criminal statutes, we mean an act done with a bad purpose, without justifiable excuse, or stubbornly or obstinately or perversely. It may be used to characterize an act done without grounds for believing it its lawful, or conduct marked with completely careless disregard of whether one has a right to do that or not." R. 1703-1704; opinion, Appendix B, p. A15, note 1.

**2. ADDITIONAL INSTRUCTIONS HELD CURATIVE IN THIS CASE**

**(a) Preceding the definition of willfulness**

"Now, the Government in this case has to show and convince you beyond a reasonable doubt before the defendant may be convicted that the defendant had income for the years 1947 and 1948, which was taxable, and that he intentionally and deliberately failed to report that income in his income tax return, and that he did so for the purpose, the deliberate purpose, of cheating or defrauding the United States out of taxes." R. 1703; opinion, Appendix B, pp. A18-A19.

**(b) Following the definition of willfulness**

"If it appears that the defendant in this case filed an income tax return for the years 1947 or 1948, and you are convinced beyond a reasonable doubt that that was a false and fraudulent income tax return, and that it was filed with the wilful purpose of defrauding the United States of taxes, then the filing of the income tax return itself is a completed offense under the statute." R. 1704; opinion, Appendix B, p. A19.

## GES ON WILLFULNESS

### BLOCH CASE

#### 1. BASIC INSTRUCTION ON WILLFULNESS

"Wilfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. It includes several states of mind, any one of which may be the willfulness to make up the crime.

"Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with careless disregard for whether or not one has the right so to act." Bloch record, p. 410; Herzog opinion, Appendix B, p. A15, note 2; Bloch opinion, Appendix E, p. A42.

#### 2. ADDITIONAL INSTRUCTIONS HELD NOT CURATIVE IN THE BLOCH CASE

**(a) Preceding the definition of willfulness**

"There are various schemes, subterfuges, and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

"The attempt to evade and defeat the tax must be a willful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws, which it was the duty of the defendant to pay to the Government.

"The attempt must be willful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant." Bloch record, pp. 409-410; Government's Petition for Rehearing in Bloch, pp. 5-6, note 1.

**(b) Following the definition of willfulness**

"It is sufficient if you find beyond a reasonable doubt that the defendant received a substantial part of the income which he is charged with receiving and that he wilfully and intentionally attempted to evade or defeat a substantial portion of the taxes alleged to have been due in the indictment." Bloch record, p. 412; Government's Petition for Rehearing in Bloch, p. 6, note 1.

"If you find that a fraudulent return was filed, with intent to defeat a part or all of the tax due, and this was done wilfully, the crime is complete as soon as the filing takes place." Bloch record, p. 413; Gov't. Pet. Reh., p. 6, note 1.

"Before finding him guilty, you must be satisfied from the evidence that any omissions on his part were made wilfully, and with intent to evade and defeat taxes due for the calendar years 1947 and 1948 to the Government." Bloch record, p. 415; Gov't. Pet. Reh., p. 6, note 1.

JUN 27 1956
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 208

J. A. HERZOG, *Petitioner,*

v.

UNITED STATES OF AMERICA

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## APPENDICES TO PETITION FOR CERTIORARI

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## APPENDIX A

### ORIGINAL OPINION BELOW (226 F. 2d 561)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14,611

Oct. 11, 1955

J. A. HERZOG, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BEFORE Mathews and Chambers, Circuit Judges, and Byrne, District Judge.

BYRNE, *District Judge:*

Appellant J. A. Herzog operated a Pontiac agency dealing in both new and used cars. His principal business appears to have been the wholesaling of used cars to other used car dealers. Most of Herzog's car sales were handled through two employees, Douglass and Cline, who received the money from the sales and purportedly turned it over to Herzog or his office manager.

In March of 1954 Herzog was indicted on three counts charging wilful attempted income tax evasion.[1] He was found not guilty on counts one and two relating to 1947 taxes, and guilty on count three relating to 1948 taxes. On this appeal, appellant does not contend that the evidence in the record is insufficient to support the guilty verdict. What he does contend is that his rights were substantially prejudiced by (a) rulings excluding certain evidence offered by him, (b) failure to give certain requested instructions, and

[1] 26 U. S. C. 145(b).

(c) denial of his request for examination of the grand jury testimony of certain witnesses.

One of the issues of fact in the case was whether side payments in excess of invoice prices were made to Herzog by the persons who purchased used cars from him. Appellant offered in evidence bi-monthly issues of the Kelley Blue Book, a trade journal that sets out estimated car prices, and a summary preperad by an accountant showing a comparison of the Blue Book price of each car, with the invoice price as shown on appellant's records and the total price (including side payments of cash) allegedly paid by the used car dealers. Appellant's asserted purpose in offering this evidence was to establish the market value of the cars and to impeach the testimony of the used car dealers by showing that the prices they claimed they paid for the cars were in excess of the market value.

There was evidence that during the period in question automobiles were scarce and that dealers paid whatever was necessary to obtain them. It is clear that the trial judge considered the Blue Books as untrustworthy in that they did not reflect the true market value and during a colloquy with counsel stated, "The evidence was that nobody paid much attention to the Blue Book during that period of time." However, even if it be said that the Blue Books did accurately reflect actual market values, they were properly excluded as they would not tend to prove or disprove any issue in the case. It is true that where market price is crucial, the state of the market may be proven by quotations or reports in trade journals. *Wolcher* v. *United States*, 200 F. 2d 493 (CA 9, 1952). Here market price is collateral to the main issue of whether or not Herzog's invoices correctly reflected the prices *paid*. Herzog and the car dealers did not disagree in any material way *as to the market value* of automobiles. Herzog said he *received* the prices listed on his books; the dealers testified that they had *paid* more than the amount listed on those books. Market value was not in issue.

Assuming that by some process of mental gymnastics it could be said that the Blue Books established the actual prices paid by the car dealers to appellant, the exclusion of the evidence would not be prejudicial. The Blue Book prices, although lower than the prices claimed to have been paid by the car dealers, were higher than the prices listed on appellant's books. The most that could be said would be that appellant understated his income in a lesser amount than that charged in the indictment. The Government is not required to show the exact amount of income tax evasion and if a smaller amount than that charged in the indictment is shown, a defendant may nevertheless be found guilty. *United States* v. *Schenck*, 126 F. 2d 702, (CCA 2, 1942).

Appellant argues that the Blue Book evidence tended to impeach the car dealer witnesses; that if they really paid as much as they claimed, they could not have expected to make any profit in view of the lower market value of the cars as shown by the Blue Books, and it just is not like car dealers to pay more than the market price for cars. This argument overlooks the fact that the Blue Book prices were higher than the prices the appellant testified he received. If there were any merit to the argument it would apply with equal force to the testimony of the appellant as it would appear to be just as unreasonable for a seller to accept less than market value as it would be for a buyer to pay more than market value.

Neal McNeil, a used car customer of appellant during 1946 and 1947, testified to transactions occurring during that period, including a conversation with appellant in which appellant told him he was going to show only a portion of his selling price on the invoice and wished to collect the balance in cash. McNeil further testified that he conformed to this procedure in purchasing cars from appellant and paid him or his employees by check for the invoice price plus an additional amount in cash. On cross examination McNeil was asked if he had been involved in difficulties with the O. P. A. during the summer of 1946. He

replied in the negative. Subsequently the appellant sought to introduce into evidence a certain journal entry appearing in McNeil's books reciting the disbursement of $2200.00 as "attorney fees etc. in connection with threatened O. P. A. suit . . . " This evidence was proffered for the purpose of impeachment and was excluded. The trial court's ruling was correct. McNeil's O. P. A. difficulties, if any, were not an issue in this case. The purpose of evidence is to prove or disprove some issue in the cause on trial. If proffered evidence does not tend to do either of these things, it has no place in the trial and is either immaterial or collateral to the inquiry. A witness cannot be impeached where the subject matter of his testimony is either immaterial or collateral to the issues in the cause in which the testimony is given. *Arine* v. *United States*, 10 F. 2d 778 (CCA 9); *Shanahan* v. *Southern Pacific Co.*, 188 F. 2d 564 (CA 9).

The government produced evidence that 18 new "house" or "executive" cars were transferred into appellant's personal ownership and subsequently when resold the income was not recorded on the books of the agency nor reflected in appellant's tax returns. The appellant then offered evidence to show that there were 13 other "house" or "executive" automobiles registered in his name and when resold the sales were recorded on the books. This evidence was properly excluded as immaterial. A defendant cannot establish his innocence of crime by showing that he did not commit similar crimes on other occasions. Cf. *United States* v. *Dennis*, 183 F. 2d 201, 232 (CA 2d). For the same reason evidence was properly excluded which was offered for the purpose of showing that there were some sales as to which no evidence of side money had been presented.

The appellant complains that the court erred in refusing to give requested instructions concerning bias or interest of witnesses. A trial court is not obliged to give an instruction in the language requested but may use words of its own selection. *Nye & Nissen* v. *United States*, 168 F. 2d 846 (CCA 9), affirmed 336 U. S. 613; *Wright* v. *United States*,

175 F. 2d 384 (CA 8); *Petro* v. *United States*, 210 F. 2d 49 (CA 6). The court instructed the jury that a witness is presumed to speak the truth; that this presumption may be rebutted . . . "by the manner in which he testifies . . . (by demeanor) . . . (by contradiction) . . . *by his relationship to the Government on the one hand and to the defense on the other hand.*" (emphasis added). This was a clear and accurate instruction that the jury, in evaluating the testimony of witnesses, should consider possible bias or interest. The appellant's claim of prejudice is without merit.

During the course of the trial, counsel for appellant requested that a transcript of the grand jury testimony of witnesses Douglass and Cline be made available for counsel's inspection. The trial court denied appellant's request remarking, "You have to make some showing that it would be impeaching, otherwise it is a fishing expedition . . . " Appellant assigns this ruling as error and cites as authority for his contention, *Gordon* v. *United States*, 344 U. S. 414; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *Shelton* v. *United States*, 205 F. 2d 806 (CA 5); *United States* v. *Cohen*, 145 F. 2d 82 (CCA 2); *United States* v. *Krulewitch*, 145 F. 2d 76 (CCA 2); *United States* v. *Alper*, 156 F. 2d 222 (CCA 2).

Other than the *Alper* case, the cases cited by appellant all deal with statements given by a witness to Government agents rather than testimony before a grand jury. None of the cases suggests that grand jury testimony or statements in Government reports should be turned over to the defendant to inspect for possible impeachment material without some prior showing that statements contradictory to the witness's testimony at trial are contained therein. In the *Gordon* case the Supreme Court reversed a conviction because of the denial of a motion to inspect pretrial statements of Government witnesses. After noting that the holdings of their opinion were confined to the limited and definite category of documents dealt with in that case, the Court stated: "By proper cross-examination, defense coun-

sel *laid a foundation* for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, *were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main issue to be tried: . . .* " (emphasis added).

Surely there is at least as great a need for laying a foundation before invading the secrecy of grand jury proceedings, as would ordinarily be required before permitting the examination of statements and reports in the possession of the prosecutor. A trial court unquestionably has the power, under Rule 6(e) of the Federal Rules of Criminal Procedure, to order grand jury proceedings transcribed and produced for inspection by the defendant but such power should be exercised only where there is a clear showing that the ends of justice require it.

The *Alper* case does not deal directly with the question of inspection by the defendant of grand jury testimony: rather it concerns itself with inspection, preliminarily, by the trial judge. The purpose of the court's inspection is, of course, to determine whether in the court's discretion the testimony should be made available to the defendant. In the instant case the trial judge was not requested to inspect the grand jury testimony. Appellant's request was that the testimony be produced for the appellant's (not the trial judge's) inspection. We are not to be understood as saying that it would have been error to refuse such a request had it been made. The exercise of the power to compel disclosure of matters occurring before the grand jury is within the court's discretion, and a preliminary examination looking to the exercise of that discretion should be undertaken by the judge only upon a proper showing. The *Alper* court enumerated certain criteria which should be taken into account before grand jury testimony is ordered transcribed and produced for the court's inspection. To the criteria there enumerated, we add another. The person

requesting the inspection should be required to specify the particular statements he is seeking for impeachment purposes. It is one thing to ask a trial judge to inspect the transcript of grand jury proceedings to determine whether a witness there testified he spent the month of July in Alaska, or that he had a gun in his possession on a certain occasion, or that he rode a white horse in a parade. It is an entirely different matter to ask a trial judge to inspect the transcript and then make known to the parties whether in his opinion *any* statements of a witness before the grand jury contradict *any* statements the witness made during the course of the trial. Not only is the latter course a "fishing expedition", but the judge is chumming the fish for the fisherman. For the judge to act as associate counsel in this manner is contrary to every concept of proper judicial functions.

In the case at bar neither of the witnesses whose grand jury testimony the defendant sought to examine were questioned during cross-examination with respect to any contradictory statements they might have uttered before the grand jury, nor was it suggested to the court what contradictory statements the defendant hoped to find. There was no attempt to lay a foundation of any kind and the trial court did not err in denying the appellant's request.

During oral argument the appellant for the first time objected to the trial judge's charge to the jury on wilfulness. We are not required to determine whether there is any merit to this belatedly raised point since there was no objection made to the instruction prior to the time the jury retired. Rule 30 of the Federal Rules of Criminal Procedure provides in part: " . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . " But, argues the appellant in a supplemental brief following oral argument, this court's decision in *Bloch v. U. S.*, 221 F. 2d 786, rehearing denied 223 F. 2d 297, requires this division of the court to disregard Rule 30, and

"This Court's decision in the *Bloch* case requires reversal here." Appellant points to the similarity of the disputed instructions in *Bloch* and this case; that in neither case was the disputed instruction objected to in the trial court; that the *Bloch* court disregarded Rule 30 and consequently this division of the court must do the same. Having been left with no alternative we disagree with the *Bloch* case. We agree with *Brown* v. *United States*, 222 F. 2d 293 (CA 9), which was decided three days after and overrules *sub silentio* the *Bloch* case. In the *Brown* case the court refused to consider the objection because there had been no compliance with Rule 30 and stated, "It is not necessary to discuss the merit of the disputed instruction inasmuch as no objection to it was made by appellant prior to the time the jury retired."

Appellant's contention that he is entitled to have the disputed instruction considered on the merits if *Bloch* was so entitled in his case is not unreasonable and, by the same token, *Brown* would be entitled to have the merits of the disputed instruction considered in his case. The *Brown* case and the *Bloch* case cannot both be right. It is not a situation where each case presents a separate problem dependent upon the instructions considered as a whole, nor is it a question of whether the instruction is slightly tainted with error or seriously tainted. The question is whether the court *reaches the merits* of the objection to *any instruction* where Rule 30 has not been complied with. We agree with *Brown* that absent an objection in the trial court, this court does not reach the merits of an objection to instructions.

There is a long line of Ninth Circuit cases in addition to *Brown* v. *U. S.*, supra, which specifically hold that appellate courts will not look to the merits of objections where Rule 30 has not been followed. It is true that the force of some of these decisions has been weakened where the court, after stating that the objection need not be considered on the merits, proceded by way of dictum to indicate that even if

it were considered on the merits it would be found that there was no prejudicial error. Despite the erosive weakening effect of this dictum, this circuit has almost without exception upheld Rule 30. See *Mitchell* v. *U. S.*, 213 F. 2d 951, 957 (CA 9); *Bateman* v. *U. S.*, 212 F. 2d 61, 70 (CA 9), "Under Rule 30 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., failure to except to an instruction on the ground urged on appeal forecloses review of the question."; *Kobey* v. *U. S.*, 208 F. 2d 583, 598 (CA 9); *Benatar* v. *U. S.*, 209 F. 2d 734, 743 (CA 9), "We are precluded by Rule 30 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., from reaching the merits of the appellants' objection . . . "; *Zamloch* v. *U. S.*, 193 F. 2d 889, 892 (CA 9), " . . . under Rule 30 of the Rules of Criminal Procedure, 18 U. S. C. A., in order to have considered an assignment of error in the failure to give a specific instruction a request that it be given must first be made to the Court."; *Enriquez* v. *U. S.*, 188 F. 2d 313, 316 (CA 9), "We may say that Rule 30 is not designed as a mere trap for the unwary. Painstaking compliance with its requirements, although not an easy matter for the lawyer, is of the very essence of the orderly administration of criminal justice."; *Ziegler* v. *U. S.*, 174 F. 2d 439, 448 (CA 9), "Appellant did not object to any portion of the charge or omission therefrom before the jury retired to consider its verdict. Hence we are not required to consider specifications 6-13."

There are decisions from other circuits which recognize that Rule 30 precludes appellate courts from considering objections to instructions made for the first time on appeal.[2] In other cases the court indicates (in most instances dictum) that it may disregard Rule 30 where there is

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[2] *Contreras* v. *U. S.*, 213 F. 2d 96, 99 (CA 5);
*Finnegan* v. *U. S.*, 204 F. 2d 105, 115 (CA 8), cert. den. 346 U. S. 821;
*U. S.* v. *Furlong*, 194 F. 2d 1, 3 (CA 7);
*James* v. *U. S.*, 191 F. 2d 472 at 474 (CADC);
*U. S.* v. *McCarthy*, 170 F. 2d 267, 268 (CA 2);
*Thayer* v. *U. S.*, 168 F. 2d 247, 249 (CCA 10).

"grave error amounting to a denial of a fundamental right",[3] where there are "unusual circumstances present",[4] where error "affects substantive rights",[5] where the error is "plain and fundamental".[6] One court went so far as to say, "Although these rules (F. R. Crim. P.) so recently promulgated by the Supreme Court and having the effect of law should be obeyed we may in our discretion conclude not to apply them."[7] In the cases where the courts have indicated that they may disregard this rule if they so choose, they in most instances cite as authority for this power, *Screws* v. *U. S.*, 325 U. S. 91, 107 (1944) and *U. S.* v. *Atkinson*, 297 U. S. 157 (1936). The flaw is at once apparent when it is recognized that both of these cases were decided *before Rule 30* was promulgated by the Supreme Court pursuant to authority from Congress. To the extent that the *Screws* and the *Atkinson* cases conflict with Rule 30, they have not been the law since the Federal Rules of Criminal Procedure became effective March 21, 1946.[8] Rule 30 is clear and unambiguous and its application is not dependent upon the personal whims of the court. It provides that no portion of the charge to the jury or omission therefrom may be assigned as error unless objection is made before the jury retires. This rule which has the force of law leaves no area in which it may be disregarded. There is no distinction made for "grave error", "fundamental error", "slight error", "serious error" or any other kind of error. If there is a failure to except to an instruction the appellate courts are foreclosed from reviewing the question. Obviously if this court is precluded from reach-

[3] *Fisher* v. *U. S.*, 212 F. 2d 441, 444 (CA 10).

[4] *U. S.* v. *Marachowsky*, 201 F. 2d 5 (CA 7).

[5] *Tatum* v. *U. S.*, 190 F. 2d 612, 614 (CADC).

[6] *U. S.* v. *Bushwick Mills*, 165 F. 2d 198, 201 (CCA 2).

[7] *U. S.* v. *Perplies*, 165 F. 2d 874 (CCA 7).

[8] The *Bloch* case also relied upon *Morris* v. *United States*, 156 F. 2d 525, a Ninth Circuit Case, the trial of which took place before the adoption of the Federal Rules of Criminal Procedure.

ing the merits of the objection, it does not reach the question of whether the error was "grave", "slight", "serious" or whether there was error at all.

Some courts appear to find in Rule 52[9] the authority to disregard Rule 30. See *Bloch* v. *United States*, supra. It would indeed be an anomaly if the Supreme Court in adopting and promulgating both of these rules at the same time intended that one would nullify the other. An examination of these rules clearly reveals that there is no conflict between them. Rule 52 does four things: (1) defines "Harmless Error", (2) provides that "Harmless Error" shall be disregarded by the courts, (3) defines "Plain Error", and (4) provides that "Plain Error" may be noticed although not brought to the attention of the court. The definitions make it clear that *all* error is either "Harmless" or "Plain" depending upon whether it affects substantial rights. It cannot be disputed that "Plain" error and prejudicial error mean the same thing, as prejudicial error is error which affects substantial rights. Cf. *Kotteakos* v. *U. S.*, 328 U. S. 750. There is no mysterious third type of error which appellate courts may recognize under certain circumstances. If error is harmless it will not be considered whether called to the attention of the court or not; if it is plain or prejudicial error it *must* be considered if properly brought to the attention of the court and *may* be considered although not brought to the attention of the court.

Those who seek to derive support from Rule 52(b) for the nullification of Rule 30, read into Rule 52(b) the words

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[9] RULE 52. HARMLESS ERROR AND PLAIN ERROR

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

"by appellate courts" and "trial" so that the rule will read: "Plain errors or defects affecting substantial rights may be noticed *by appellate courts* although they were not brought to the attention of the *trial* court." That of course is not what the rule states. The words "the court" refer to the court which notices the error and the clear meaning of the sentence is that a court may notice plain or prejudicial error although not brought to the attention *of the court noticing the error.* In applying the rule this court *may* notice plain or prejudicial error although not set forth as a specification of error relied upon as required by Rule 18(d) of the rules of this court. The manifest intent of the rule is to permit courts *sua sponte* to notice error which the parties through neglect or inadvertence failed to call to the court's attention,[10] but *it does not authorize the consideration of matters which another rule specifically states shall not be assigned as error.*

Every experienced member of the Bench and Bar knows that there are counselors who are very adept at sowing error in the record to provide an "ace in the hole" for reversal on appeal in the event of an adverse verdict of the jury. The trial judge does not have an opportunity to scrutinize proposed jury instructions at his leisure. Ordinarily the trial is delayed and the jury remains at recess while the judge settles the instructions with counsel after each party has submitted several dozen instructions. The attention of the court is engaged in the consideration of those instructions which are questioned by counsel with time for only a cursory examination of the instructions which are agreed upon by both parties. This would be a very fertile field for sowing error if a defendant were permitted to assign as error a charge in which he acquiesced.

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[10] The revisor's note to the section states that Rule 52(b) is based upon *Wiborg* v. *United States*, 163 U. S. 632, and former Rule 27 of the Supreme Court which provided that errors not specified would be disregarded, "save as the court, at its option, may notice a plain error not assigned or specified".

Rule 30 is designed to impede such tactics and its salutary purpose should not be frustrated by giving a twisted construction to a simultaneously promulgated rule.

Affirmed.

CHAMBERS, *Circuit Judge*, concurring:

I concur. Although I disagree with the decision in the Bloch case, I would be reluctant to go against it were it not for my belief that Brown v. United States, 9 Cir., 222 F. 2d 293, already has overruled Bloch sub silentio.

(Endorsed:) Opinion and Concurring Opinion. Filed Oct. 11, 1955. Paul P. O'Brien, Clerk.

## APPENDIX B

### OPINIONS ON REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14,611

May 29, 1956

J. A. HERZOG, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BEFORE: DENMAN, *Chief Judge*, STEPHENS, HEALY, BONE, ORR, POPE, LEMMON, FEE, and CHAMBERS, *Circuit Judges*.

HEALY, *Circuit Judge:*

Appellant was indicted on three counts charging willful attempted evasion of federal income taxes. Two counts related to 1947 taxes and the third concerned those of 1948. The accused was acquitted on the first two counts and convicted on the third. On appeal the judgment of conviction was affirmed, 226 F. 2d 561.

Appellant petitioned for a rehearing and his petition was in part granted, limited to questions pertinent to the conflict or apparent conflict between the decision rendered on the appeal and the decision of this court in Bloch v. United States, 221 F. 2d 786. On all other points the petition for rehearing was denied. On motion of the court hearing the appeal herein, and pursuant to our Rule 23, the rehearing was ordered to be had en banc, limited as above indicated. The court en banc thereupon heard argument on behalf of the appellant and on behalf of the United States on the issues as so limited.

The primary question for our resolution is whether the power of the court under Rule 52(b) of the Rules of Criminal Procedure is limited or circumscribed by the provision of Rule 30 stating: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Rule 52(b) reads: "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Like the present case, *Bloch*, supra, involved charges of income tax evasion. In each case an instruction had been given essaying to define the term "willfully" as used in the statute. That given here is shown in footnote 1 below, and that in *Bloch* is quoted in footnote 2. In neither case did the defendant object to the instruction as required by Rule 30. Upon the appeal in *Bloch* the court on its own initiative determined that the willfullness instruction constituted prejudicial error "in this case." It found error also in another instruction reading as follows: "The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person con-

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[1] "Now, when we use the term 'Wilful' in speaking of a violation of this statute, as used in this criminal statute and as used in most criminal statutes, we mean an act done with a bad purpose, without justifiable excuse, or stubbornly or obstinately or perversely. It may be used to characterize an act done without grounds for believing it is lawful, or conduct marked with completely careless disregard of whether one has a right to do that or not."

[2] "Wilfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. It includes several states of mind, any one of which may be the willfulness to make up the crime.

"Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act."

sciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax." This instruction was thought, on the authority of Morissette v. United States, 342 U. S. 246, 273, not to be a correct statement of the law in a prosecution for income tax evasion. No comparable instruction was given in the present case. (Apart from these two instructions in *Bloch*, there appears to have been misconduct of counsel which might of itself have warranted the reversal. See opinion on denial of the government's petition for rehearing, 223 F. 2d 297, where the court noted the government's confession of error because of misconduct.)

In the cause presently before us the question of the validity of the instruction was first injected by counsel in the course of oral argument on the appeal; and in a supplemental brief filed later the attention of the court was directed to the *Bloch* decision. The court held that the provision of Rule 30, quoted above, forecloses the courts from noticing on appeal errors or omissions in instructions where objection thereto was not made below. See the opinion, 226 F. 2d, p. 567 et seq.

Criminal Rule 30 by its terms precludes *a party* from assigning as error the giving of an instruction to which he has not objected on the trial. Rule 52(b), appearing under the caption "General Provisions," is not directed to the party, but is a grant of authority to the court itself. These rules are not conflicting. Rather, they complement each other. Rule 52(b) was doubtless designed to take care of unusual or extraordinary situations where, to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings, the courts are broadly empowered to notice error of their own motion.[3] The Rule is in the nature of an anchor to windward. It is a species of safety pro-

[3] The Rule is, of course, applicable both in the trial and in the appellate courts.

vision the precise scope of which was left undefined. Its application to any given situation must in the final analysis be left to the good sense and experience of the judges.

Subsequent to the adoption of the criminal rules many of the circuits have noticed asserted error in instructions not objected to below. See cases cited in the footnote.[4] In doing so the courts have not been unmindful of Rule 30. Thus in Lazarov v. United States, 6th Cir., decided as late as July 1955, Judge McAllister, writing the opinion, remarked that "of course, an appellate court will consider an error in the charge which is seriously prejudicial or amounts to a grave miscarriage of justice even though no objection was made at the trial." And see the extensive and scholarly discussion of the subject by the Seventh Circuit in United States v. Vasen.

This court has not gone overboard in its application of Rule 52(b) to situations such as here presented, and it does not propose to do so now. In the great bulk of the cases in which counsel have sought to have us consider claims of error in instructions not objected to at the trial we have declined to do so. More than once we have stressed the salutary nature of Rule 30 and the vitally important part it plays in the administration of justice. Thus in Enriquez v. United States, 188 F. 2d 313, at p. 316, we remarked that Rule 30 "is not designed as a mere trap for the unwary. Painstaking compliance with its requirements, although not an easy matter for the lawyer, is of the very essence of the orderly administration of criminal justice." But, in common with the generality of the circuits, we recognize that the Rule does not debar us from noticing of our own mo-

[4] Daigle v. United States, 1st Cir., 181 F. 2d 311, 313; United States v. Cumberland, 3d Cir., 200 F. 2d 609; United States v. Ward, 3d Cir., 168 F. 2d 226, 228; Lazarov v. United States, 6th Cir., 225 F. 2d 319, 329; United States v. Vasen, 7th Cir., 222 F. 2d 3, 5-6; United States v. Raub, 7th Cir., 177 F. 2d 312, 315; Apodaca v. United States, 10th Cir., 188 F. 2d 932, 937; and Robertson v. United States, D.C. Cir., 171 F. 2d 345.

tion error in instructions thought to have resulted in a miscarriage of justice.

The point remaining to be considered by the court en banc is whether under the circumstances here present the error, if any, in giving the willfullness instruction was of so serious a nature as to warrant the disregard of Rule 30. That question is "pertinent" to the matters on which the limited rehearing was granted, and decision of it is essential to the disposition of the rehearing.

It appears that in income tax evasion cases many of the trial courts have fallen into the practice of defining the term "willfullness" in language much the same as that employed in the instruction here and in *Bloch*. Doubtless these instructions stem from verbiage found in United States v. Murdock, 290 U. S. 389, where, at page 394, the Court recited with seeming approval a variety of definitions given the word in judicial decisions. The recital in *Murdock*, however, would hardly seem a safe guide to follow in the formulation of instructions in all income tax evasion cases.

In determining whether the giving or the failure to give an instruction warrants a reversal, the courts are not to consider the instruction in isolation. They are obliged to examine the charge as a whole in light of the factual situation disclosed by the record. Such is the course followed even in the normal criminal case, where the accused has preserved his right of review by timely and appropriate objection on the trial. Leaving out of account the charge under attack, the instructions given here stated the issues fully and fairly. A few excerpts will suffice to disclose their general tenor. Immediately prior to giving the "willfulness" charge the judge said: "Now, the Government in this case has to show and convince you beyond a reasonable doubt before the defendant may be convicted that the defendant had income for the years 1947 and 1948, which was taxable, and that he intentionally and deliberately failed to report that income in his income tax return,

and that he did so for the purpose, the deliberate purpose, of cheating or defrauding the United States out of taxes. That is the burden of proof that rests upon the government under this statute." Immediately following the instruction complained of the court stated: "If it appears that the defendant in this case filed an income tax return for the years 1947 or 1948, and you are convinced beyond a reasonable doubt that that was a false and fraudulent income tax return, and that it was filed with the wilful purpose of defrauding the United States of taxes, then the filing of the income tax return itself is a completed offense under the statute."

We turn briefly to the pertinent evidence in the case. Appellant operated a Pontiac agency, dealing in both new and used cars. His principal business was the sale of used cars at wholesale to used car dealers. During the period in question used cars were in great demand and hard to come by. In making these sales, according to witnesses for the government, appellant exacted "side" payments in cash from the dealers in addition to the price appearing on the invoices or sales orders. These cash "side" payments were not reflected on appellant's books, and concededly the amounts thereof were not reported in his income tax returns. In appellant's original brief on the appeal, this asserted practice in the wholesaling of used cars was characterized as "the principal contention of the prosecution." Appellant's answer to the government's evidence on this vital phase was a flat and unequivocal denial. There was no claim on his part of inadvertence, mistake, or the like. The issue was squarely one of credibility—whether the accused did or did not receive "side" money through his sales to used car dealers. Thus in respect of this major issue the instruction on willfulness was at worst purely innocuous.

But appellant argues that in connection with another aspect of the case—the disposition of certain new cars re-

ferred to as "house" cars—he did make claims of inadvertence and confusion, and on that phase he contends that he may well have been prejudiced by the instruction. If we felt ourselves confronted with an extraordinary situation such as would justify a disregard of the salutary provisions of Rule 30 we would consider the argument. But a reading of the instructions as a whole, plus an examination of the evidence pertinent to the matters being reheard, leaves us with no belief or apprehension that the giving of the willfulness charge may have resulted in a miscarriage of justice or in the denial to appellant of a fair trial.

Judgment affirmed.

WILLIAM HEALY,
HOMER T. BONE,
WILLIAM E. ORR,
WALTER L. POPE,
DAL M. LEMMON,
United States Circuit Judges

DENMAN, Chief Judge, concurring in Judge Healy's opinion:

The order for the in banc hearing reads:

> "Upon motion of the court as originally constituted for the hearing of cause No. 14611, J. A. Herzog v. United States of America, a rehearing en banc is granted and limited to questions pertinent to the conflict or apparent conflict between the decision herein rendered on October 11, 1955, and the decision of this court in Bloch v. United States, 221 F. 2d 786, rehearing denied 223 F. 2d 297."

It has been seriously questioned whether, where an appeal in a division involves the consideration of several issues, the court in banc may order a rehearing in banc limited, as here, to but one of the issues.

The pertinent provision is 28 U.S.C. 46(c), reading:

> "(c) Cases and controversies shall be heard and determining by a court or division of not more than three judges, unless a hearing or *rehearing before the court in banc is ordered* by a majority of the circuit judges of the circuit who are in active service. . . ." (Emphasis added.)

It is apparent that a hearing in banc of a division's decision is identical in all material respects with the reviewing by the Supreme Court of a case decided by a court of appeals, by its certiorari order. For this 28 U.S.C. 1254 (1) provides:

> "§ 1254. Courts of appeals; certiorari; appeal; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

In both courts the reviewing is a matter of the court's discretion. In both courts the decision to be reveiwed is a matter to be considered de novo and the judgment of the court reviewed may be affirmed or reversed.

The Supreme Court has frequently confined its certiorari review to the consideration of less than all the issues considered by the court of appeals. Typical is the case of Dennis v. United States, 341 U.S. 494, where the Court's opinion states at page 516:

> "We have not discussed many of the questions which could be extracted from the record, although they were treated in detail by the court below. Our limited grant of the writ of certiorari has withdrawn from our consideration at this date those questions, which include,

*inter alia*, sufficiency of the evidence, composition of jury, and conduct of the trial."

It is my opinion that the court in banc has this same power to limit the issues to be reviewed as the Supreme Court has on certiorari. This is confirmed by the language of the Court in Western Pacific Railroad Case, 345 U.S. 247, 267, in discussing Section 46(c) that "We hold that the statute is simply a grant of power to order hearings and rehearings *en banc* and to establish the procedure governing the exercise of that power." and that the language on page 270 of Justice Frankfurter's concurring opinion that "Rehearings *en banc* by these courts, which sit in panels, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern. . . ."

(Endorsed:) Opinion and Concurring Opinion of Denman, C. J. Filed May 29, 1956. Paul P. O'Brien, Clerk.

CHAMBERS, Circuit Judge, concurring and dissenting:

I concur in the affirmance of the judgment of conviction.

The opinion of Judge Stephens is well reasoned. There is one possible answer to his views. That is: if the panel which first heard the case inadvisedly placed a limitation on the scope of the rehearing and the court en banc compounded the error by specifying the same limitation, then the limitations might be held ineffective, rather than the entire orders.

It has been my best judgment, the question having arisen, that the panel and the court en banc should have proceeded to amend the respective basic orders to eliminate the attempted restriction on scope of review. This has not been done.

I still adhere to my concurrence in Judge Byrne's opinion which was filed herein on October 11, 1955. And I hope that on another day it will become the law of this circuit.

It seems to me unhappy when we enforce Rule 30 in a murder case, Shockley v. United States, 166 F. 2d 704, and lay it aside in Bloch v. United States, 221 F. 2d 786, an income tax case.

Granting the power to ignore Rule 30 and find plain error, as the majority en banc holds, I am now hopeful that this shotgun, "plain error," will be kept further back in the closet. If that happens, this Bloch-Herzog business will not have been in vain. I have gone over the record in Bloch, and I think the result reached there was a great miscarriage of justice, granting the power to disregard Rule 30.

If my deductions are correct, it is a necessary corollary of the majority decision here that counsel still cannot object in this court to instruction not objected to in the trial court. But we are free to go wandering looking for plain error. Strange, isn't it?*

(Endorsed:) Concurring and Dissenting Opinion of Chambers, C. J. Filed Jun. 1, 1956. Paul P. O'Brien, Clerk.

UPON REHEARING EN BANC

(on one issue)

STEPHENS, Circuit Judge, dissenting

I dissent from the opinion of the majority of the Court en banc upon the ground that neither this court nor any member thereof has any jurisdiction to consider and pass upon but one single issue of a case in which other issues are involved on appeal to this court.

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* Counsel for Herzog imported the Bloch case here in oral argument over the uncertain bridge of "It denies Mr. Herzog due process to have the court in Dr. Bloch's case search for plain error and refuse to search for it here." That argument is nothing more than the old one that "the policeman didn't arrest two other speeders, so how can he arrest me?"

An affirmance or a reversal of a judgment by an appellate court results from the action of one court composed of judges each of whom brings his views to bear upon every issue raised and each judge must apply his own view to every issue. A conclusion reached by one judge upon any issue may be dispositive of the case in his view, while another judge may reach the same conclusion but think it of little or no effect upon the disposition of the appeal. A combination of conclusions arrived at upon separate issues by different judges of the same appellate jurisdiction can never be warped into an affirmance or reversal by some or all the judges who have participated in such separate piece-consideration of the several issues.

This instant case was heretofore regularly assigned to a Division of this court, as a duly constituted court, and, as such court, the Division considered the briefs, heard oral argument on *all* the issues on appeal, and decided the case. The judgment of the Division affirming the judgment of the District Court has never been set aside by the Division.

Upon a motion for rehearing, the Division granted it as to one issue only, whereas there were multiple issues on appeal, and this Court en banc accepted the Division's invitation to hear and decide the one issue. We have heard en banc that one issue and it alone and by its opinion the en banc majority purport to pass upon that single issue and relate the en banc majority's conclusions to the Division's disposition of the appeal.

The en banc majority's opinion in effect sets aside the Division's judgment and substitutes its own, although the Court en banc heard and considered but a part (one issue) of the case. It is but fortuitous that the substituted judgment is the same as that of the Division, albeit upon different reasoning. The difficulty I am pointing out would be more apparent had the majority decided to reverse the Division's (and the District Court's) judgment. But, of course, the difficulty exists as to each equally. It seems, as of

course, to me that the Court en banc had no jurisdiction to do as it has done, since the case itself has never been assigned to the Court en banc, nor argued to it, nor submitted to it, nor to any judges of this court other than those of the Division, as a Division and as a duly constituted court. As a matter of fact, not a single judge who has signed the Court's en banc majority opinion has ever had submitted to him any issue of the appeal other than the one single issue. Not one of the Division has agreed to the majority en banc opinion.*

How the Court's en banc majority opinion-decision is designed to be integrated with the Division's, it is impossible to know. If it is designed to replace and supercede the Division's, then the Judges who never have had anything to do but with the one single issue have decided, or have taken the Division's opinion upon, all of the other issues in the appeal "sight unseen."

If it is intended that the Court's en banc majority opinion-decision be advisory to the Division, then I say there is nothing in the law permitting an *advisory* opinion-decision upon an isolated issue of an appeal, or indicating that a Division should, would, or could act upon such advice.

The members of the Division in the instant case were unanimous in their holding on the one isolated issue, and each one considered such holding to be of weight in deciding the appeal. I have never heard it even intimated that any judge of the Division has changed, or will change, his mind or will abandon his own view as to the single issue referred to. How can any judge surrender his conviction

* The Division consisted of Judge Mathews, retired, who sat in the case by designation; of Judge Chambers, an active circuit judge; of Judge Byrne, a district judge, sitting by designation. Of the members of the Court en banc, Judges Bone and Orr retired subsequently to the sitting of the Court en banc at the hearing of the isolated issue, and participated in the en banc majority opinion after date of their retirement.

on any issue in any case simply to conform to other judges' views? And the judges of the Division still have the appeal submitted to them. How can any judge, not on the Division, pass upon an appeal in a case as a whole when he has never heard but an isolated issue of that appeal?

What the majority en banc are saying by their opinion-decision is:

> The Judges of the Division have affirmed the District Court judgment. We, en banc, officially know nothing about the case except as to the one issue referred to us, which issue the Judges of the Division regard as important. In view of the evidence related to that issue, we think on the contrary that it is of no importance to the decision of the appeal and nevertheless affirm the judgment of the District Court, as the Division did.

Thus, every judge of the Court en banc majority, without knowing a thing as to the several other issues of the appeal, without having heard oral argument on these other issues, and without having had these other issues submitted to him for decision, blindly accepts the Division's conclusion on them by participating in the decision of the Court en banc majority and affirming the judgment.

I am conscious of the fact that I joined in the order of the Court en banc accepting the one issue for consideration. Upon listening to the argument on this one issue, however, doubt as expressed above entered my mind and I promptly communicated it to the active members of the Circuit Court. I take my share of the blame for the confusion resulting, but I see no merit in going further along the line of confusion.

I would rescind our Court's en banc action and send the one issue back to the Division. And then if the Division sees fit to request the Court en banc to take over the whole

case and decide it, I would vote for the Court en banc to conform to such request.

Such a course would comply with our ninth circuit rules in every respect and would be logical and consistent with our fixed course through the years (but with one exception which I think was error) that the Court en banc is neither an appellate nor an advisory Court over a Division.

I dissent upon the fundamental ground that, in the circumstances, neither the Court en banc nor I, individually, have any jurisdiction to pass upon the isolated issue or upon any other issue or issues of the case or to affirm or reverse the Division's judgment. If a majority of the Division request it, this Court en banc can rehear the entire case. It may be that a majority of the active members of the ninth circuit Court could, by rule, provide that it can grant a rehearing in any case after judgment by a Division. But our rules at present do not so provide, and what is more, we have not assumed to do this in the instant case.

I reserve the privilege to later file an expression of my views to the effect that the Chief Judge's comparison of actions by the Supreme Court with this Court's action in the instant case, is not apposite.

(Endorsed:) Dissenting Opinion of Stephens, C.J. Filed Jun. 1, 1956. Paul P. O'Brien, Clerk.

James Alger Fee, dissenting:

I fully concur with the opinion of Judge Stephens in dissent. I did not join in the vote to write an advisory opinion on one phase of a criminal case. The majority had and has no jurisdiction to do so. The dicta set out as the views of the majority upon the issue so segregated do not agree with those of the members of the division which heard the case as a whole, as it was empowered to do under the rules, and upon which it affirmed the lower

court. Although the majority has wisely reached the same result as the division, their present opinion has no authority and may be disregarded. The opinion of the majority includes intrinsically its own refutation, since it sets out the postulate that an appellate court may notice error in an instruction unassigned, but decides that such error in this case was not prejudicial, although the majority who join in it neither heard argument on the merits nor examined the record.

The maxim, "Never plead guilty," becomes almost axiomatic when an appellate court searches for and finds error in a stock instruction, which has been given by the trial courts for many years, to release a defendant whom the evidence showed guilty. This was apparently done in the Bloch case by another division of this Court. If counsel in the trial court can sit mute where the judge gives a stock instruction not applicable or makes a slip of the tongue and such counsel can still argue in the appellate court that reversible error was committed, in the face of the plain language of the rule, there is a new pardoning power. Instructions are given in haste and there is rarely a case where technical error unexcepted to cannot be found by an earnest searcher. The proposition that appellate courts discover errors without the aid of counsel, who have gambled on the jury verdict without calling alleged error in instruction to the attention of the trial court, is usually a fiction. It was so in the case at bar. The language and propositions advanced by the division, in the printed opinion on which the judgment of affirmance in this case must stand, go too far and are somewhat lacking in restraint, but these are altogether an excellent balance against the Bloch case. On this phase, I concur with the able elucidation by Judge Chambers.

(Endorsed:) Dissenting Opinion of Fee, C. J. Filed Jun. 1, 1956. Paul P. O'Brien, Clerk.

## APPENDIX C
## JUDGMENTS AND ORDERS
### (1) ORIGINAL JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 14611

---

J. A. HERZOG, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

### JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and Entered: October 11, 1955,
PAUL P. O'BRIEN, *Clerk*.

**(2) ORDER OF DIVISION FOR REARGUMENT**

[Caption Omitted]

ORDER ON PETITION FOR REHEARING

Before: MATHEWS and CHAMBERS, Circuit Judges, and BYRNE, District Judge.

Appellant's Petition for Rehearing is granted and limited to questions pertinent to the conflict or apparent conflict between the decision rendered herein on October 11, 1955, and the decision of this court in Bloch v. United States, 221 F. 2d 786 (rehearing denied 223 F. 2d 297). Otherwise, the petition for rehearing is denied.

Upon the motion of the court as constituted for this case No. 14,611 and pursuant to Rule 23 of this court, the Chief Judge is informed that the members of the court participating in the decision of October 11, 1955, are of the opinion that the case should be reheard en banc, limited as above indicated.

/s/ CLIFTON MATHEWS
*Circuit Judge*

/s/ RICHARD H. CHAMBERS
*Circuit Judge*

(ENDORSED) Filed
November 21, 1955
PAUL P. O'BRIEN, *Clerk.*

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**(3) ORDER OF FULL COURT FOR REARGUMENT**

[Caption Omitted]

ORDER FOR EN BANC HEARING

PER CURIAM:

Upon motion of the court as originally constituted for the hearing of cause No. 14,611, J. A. Herzog v. United States of America, a rehearing en banc is granted and

limited to questions pertinent to the conflict or apparent conflict between the decision herein rendered on October 11, 1955, and the decision of this Court in Bloch v. United States, 221 F. 2d 786, rehearing denied 223 F. 2d 297.

Oral arguments will be heard at San Francisco, California, on December 12th, 1955, at 2:00 p.m. Appellee may file on or before December 8, 1955, a printed or typewritten response to appellant's petition for rehearing filed on November 9, 1955.

WILLIAM DENMAN
*Chief Judge*

ALBERT LEE STEPHENS
*Circuit Judge*

HOMER T. BONE
*Circuit Judge*

WALTER L. POPE
*Circuit Judge*

WILLIAM HEALY
*Circuit Judge*

WILLIAM E. ORR
*Circuit Judge*

DAL N. LEMMON
*Circuit Judge*

RICHARD H. CHAMBERS
*Circuit Judge*

(ENDORSED) Filed
November 21, 1955
PAUL P. O'BRIEN, *Clerk*

---

**(4) SECOND JUDGMENT**

[Caption Omitted]

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: May 29, 1956
Paul P. O'Brien, *Clerk*.

## APPENDIX D

### The Critical Importance of the Cline-Douglass Testimony and the Significant Points on Which Both Witnesses Had Already Been Impeached Prior to the Request of Inspection of the Grand Jury Minutes

In order not to lengthen unduly the body of the Petition, we have relegated to this Appendix the record references that demonstrate the critical importance of the testimony of Cline and Douglass, and the significant respects in which both witnesses' testimony had already been impeached before petitioner made his request for the inspection of the grand jury minutes covering their testimony before that body.

CLINE. The critical importance of Cline's testimony was this:

He told the Treasury agents that the side payments he received ranged from $25 to $50 per car (R. 1175), a figure small enough to enable the used car dealers to make a profit, and yet large enough to enable Cline to get rich if, as some of the evidence indicated (R. 1240, 1246), he kept those payments for himself.

He testified at the trial, however, that the side payments ranged from $50 to $300 per car (R. 1166-1167) and went through office channels to petitioner (R. 1151-1152). If this was true, then prices substantially over the market were being paid by the used car dealers, for, as has already been pointed out (Pet. 12-13, 20-21), the Kelley Blue Book valuations for 35 out of the 42 used car sales involved in the prosecution's evidence of "side money" for the conviction year totalled $35,785, in comparison with $34,720 shown on appellant's invoices and records, and as opposed to $39,245, which the purchaser, Joe Angel, claimed to have paid (Def. Ex. AB for id., p. 4; R. 1799).

Obviously, then, it was crucial to determine which testimony by Cline was correct, whether he took small payments for himself that the dealers could afford to pay, or

whether he extracted large over-the-market payments from them for petitioner's use.

The trial court's erroneous refusal to permit inspection of Cline's grand jury testimony deprived the jury of light on this vital point.

Douglass. The importance of Douglass as a prosecution witness is apparent. It was to him, and to a lesser degree to Cline, that the used car dealers allegedly paid the "side money"; and it was through him that the money was allegedly transmitted to petitioner. His testimony was the indispensable connecting link without which the prosecution could not have established a case against petitioner.

Douglass' credibility was undermined to a considerable extent by the sworn statement he had given to Treasury investigators in 1952 (Def. Ex. T; R. 1809-1847), which disclosed the following inconsistencies in what he said at different times:

(a) In his 1952 statement, Douglass specifically denied, in two separate answers, that the price actually charged the used car dealers was greater than the price shown on the invoice (R. 1820). Then, when informed by the Treasury agents that they could produce a dozen witnesses to testify that they had paid currency in excess of the invoice price to Douglass personally, he claimed to have misunderstood the prior questions, admitted he had collected such money, and contended he had turned it over to petitioner (R. 1820-1823).

(b) In his 1952 statement, Douglass swore that petitioner, rather than Douglass, negotiated most of the wholesale sales of used cars with the used car dealers (R. 1818). At the trial, after the used car dealers had already testified that they had dealt predominantly if not exclusively with Douglass, he said, "Well, I probably handled the negotiations in the greater proportion of them" (R. 1056). He attempted to explain this discrepancy at the trial by drawing a distinction between "negotiation" and "handling" (R. 1075).

(c) In his 1952 statement, after he had already changed his testimony regarding the *used* car sales and had testified to collecting side money and paying it over to petitioner, Douglass was questioned about the collection of side money on sales of *new* cars without a trade-in. In five separate answers, Douglass denied that he had ever collected such side money, denied that petitioner had done so, and stated that petitioner had given him "hard and fast" instructions against collecting such money (R. 1837, 1839-1840). At the trial, however, after three witnesses had testified to paying side money in cash to Douglass personally on the sale of new cars without a trade-in (R. 511-512; R. 537-540, 601; R. 858-861, 914-915), Douglass testified that it was a "general practice" to collect side money on new car sales (R. 1063-1065). When confronted with this inconsistency at the trial, Douglass stated that when he gave the 1952 statement he had had the knowledge that petitioner had instructed him to collect side money on new cars (R. 1084).

(d) After his trial testimony had been thus impeached, Douglass stated on redirect examination that, in a conference with petitioner and petitioner's counsel, he had been requested to "go easy" in making his statement to Internal Revenue (R. 1101), and that petitioner had paid the fee of the attorney who had accompanied Douglass when he made the statement (R. 1100). Douglass subsequently admitted, however, that he had himself decided that he wanted legal representation on that occasion; that he had asked petitioner to pay the fee therefor because he was incurring that expense as a result of his employment; and that petitioner's counsel had agreed to do so only if Douglass would authorize petitioner's counsel to inform the Internal Revenue investigators that petitioner was paying the fee of Douglass' attorney (R. 1112-1113).

Since, therefore, Douglass had sought to rehabilitate himself, after having been impeached by significant self-contradictions, by contending, in effect, that petitioner had suborned the falsehoods contained in the statement Doug-

lass had given in 1952, it would have been of substantial advantage to petitioner to show—if such were the case—that at the time the indictment was returned, in March of 1954 (R. 6), and after petitioner had discharged Douglass (R. 1365-1367), the latter gave testimony to the grand jury that was inconsistent with his trial testimony.

Since the prosecutor at no time contended, even by implication, that examination of the grand jury testimony would delay the trial, his unwillingness to make that testimony available for inspection strongly suggests that it would not have been favorable to the prosecution. In any event, by refusing inspection unequivocally, the trial judge cut off inquiry into the veracity of a key witness against the petitioner.

## APPENDIX E

## OPINIONS OF THE COURT BELOW IN BLOCH v. UNITED STATES

### (1) ORIGINAL OPINION, 221 F. 2d 786

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 14,266

---

Apr. 11, 1955

---

BERNARD BLOCH, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

---

Appeal from the United States District Court
for the District of Arizona

---

Before: BONE and POPE, Circuit Judges, and MURRAY, District Judge.

MURRAY, District Judge:

Appellant was charged in the District of Arizona in two counts with attempting to evade or defeat the payment of income taxes owing by him for the years 1947 and 1948, in

violation of Section 145(b), Title 26, U.S.C.A.[1] After trial by a jury in the District Court, appellant was acquitted on Count one (1947 taxes) and convicted on Count two (1948 taxes). He appeals, assigning three specifications of error.

The first specification of error relied on is that the District Court erred in failing to give appellants requested Instruction No. 2.[2] There is no merit in this specification of error as such. In the first place, the instruction as requested is at least misleading and confusing, if not clearly erroneous. Counsel for appellant attempted to take the instruction from the case of Gaunt v. United States, 184 Fed. (2d) 284, 291, but omitted a portion of the last sentence of the instruction on wilfulness approved in the Gaunt case, supra. In the Gaunt case the last sentence of the instruction read:

---

[1] Sec. 145(b). Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

[2] The indictment in this case charges a violation of a willful attempt to evade or defeat a tax imposed by Section 145(b) of Title 26, United States Code. I instruct you that willfully "means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or do wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent or grossly negligent. A defendant is not willfully evading a tax if he is careless about keeping his books. He is not willfully evading a tax if all that is shown is that he made errors of law. He is not willfully evading a tax if all that is shown is that he in good faith acted contrary to regulations laid down by the Bureau of Internal Revenue and the United States Department of Treasury. He certainly is not willful if he acts without advice of a lawyer or accountant."

"He certainly is not wilful if he acts without advice of a lawyer or accountant, for there is no requirement that a taxpayer, no matter how large his income, should engage a lawyer or an acountant."

Even that language, it seems to us, may be misleading because it might be subject to the interpretation that acting without advice of a lawyer or accountant shows a complete absence of wilfulness, and such is not the law. What was meant to be said is that merely acting without advice of a lawyer or accountant does not itself prove wilfulness. But by omitting the explanation "for there is no requirement that the taxpayer engage a lawyer or accountant", which was contained in the Gaunt case, from the requested instruction in this case, the instruction became completely unacceptable, and it was not error for the trial Court to refuse it.

Furthermore, the trial Court is not obliged to give an instruction in the exact language in which it is proposed, but may choose his own language. Wright, et al. v. U. S., 175 Fed. (2d) 384; Nye & Nissen v. U. S., 168 Fed. (2d) 846, affirmed 336 U. S. 613; Thayer v. U. S., 168 Fed. (2d) 247; Petro v. U. S., 210 Fed. (2d) 49. As the Court said in Wright, et al. v. U.S., supra:

> "Fortunately, a trial judge, in formulating his charge, is entitled to use his own language and is not required to let counsel for either party put words into his mouth. If the charge is accurate and gives to the jury all of the law which it needs in order to reach a verdict, that is enough."

However, in examining the Court's charge to determine whether the jury was otherwise properly instructed as to the meaning of the word "willfully" as used in Section 145(b), Title 26, U.S.C.A., it becomes apparent that the charge was incorrect in several aspects, which will be hereinafter discussed.

The appellant made no objection to the charge as given by the Court, but only objected to the failure of the Court to give his requested instruction, nor did appellant raise in this Court any question regarding the correctness of the trial Court's charge on wilfulness. Whether the objection to the failure to give the offered instruction on wilfulness in the trial Court, and the specification of that failure as error in this court would be a sufficient saving of the point to permit this Court to consider other non-specified errors in the charge on wilfulness within the rule that Appellate Courts will not consider instructions to which no objections were taken at the time of trial need not be decided because of the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure and cases decided thereunder. Rule 52(b) provides:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The Supreme Court of the United States in U. S. v. Atkinson, 297 U. S. 157, concerning this matter, said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

See also Morris v. United States, 156 Fed. (2d) 525; U. S. v. Balodimas, 177 Fed. (2d) 485; U. S. v. Perplies, 165 Fed. (2d) 874; Fischer v. U. S., 212 Fed. (2d) 441, 444.

The error of the trial court is, as we hereinafter point out, fundamental and goes to the very essence of the case so we must under the rule take notice of it.

Proceeding then to a consideration of the Court's charge we find the trial Court instructed the jury in part as follows:

"The attempt must be wilful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant."

That is a correct statement of the law, because the intent involved in the offense with which appellant here was charged is a specific intent involving the bad purpose and evil motive to evade or defeat the payment of his income tax. Wardlaw v. U. S., 203 Fed. (2) 884. However, the trial Court went on in his instruction, and in the very next sentence said:

"The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

This is not a correct statement of law with regard to a criminal offense wherein specific intent is an essential element. Morissette v. U. S., 342 U. S. 246, 273; Wardlaw v. U. S., supra. As the Supreme Court said in the Morissette case, supra, at page 275:

"We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.

> Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

The conclusion sought to be supplied by presumption in the Morissette case was one of intent to steal casings, based upon the mere fact the defendant took them. What was said in that case applies equally to the case at bar where under the above portion of the trial Court's charge the jury was told in effect that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return.

The trial Court further instructed the jury as follows:

> "Wilfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. *It includes several states of mind, any one of which may be the willfulness to make up the crime.*
>
> "*Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act.*" (Italics supplied)

We think that the italicized portion of the above instruction is erroneous in this case.

This portion of the Court's charge apparently was taken from the language of the Supreme Court in U. S. v. Murdock, 290 U. S. 389 at 394. The Murdock case was one in which defendant was indicted for refusal to give testimony and supply information as to deductions claimed in his tax returns for moneys paid to others in violation of Section 1114(a) of the Revenue Act of 1926 and Section 146(a) of the Revenue Act of 1928 which sections were identical.

Those sections provided that:

> "any person * * * required by law or regulations * * * to supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to * * * supply such information * * * shall * * * be guilty of a misdemeanor * * *."

When the Supreme Court there used the language which is embodied in the quoted portion of the trial Court's charge in this case, it was talking about how the word "wilfully" is variously defined under different statutes and circumstances. It is significant that in that case the Supreme Court, addressing itself to the particular case before it, said:

> "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent which the statute makes an element of the offense."

The Murdock case itself does not apply the definition of "wilfully" used by the trial Court in the instant Section 145(b) case.

In this Section 145(b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the payment of the income tax that is due. Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section. See Hargrove v. U. S., 67 Fed. (2d) 820, 823, wherein the Court discussed and distinguished the element of intent necessary

under different statutes. See also U. S. v. Martell, 199 Fed. (2d) 670.

These errors in the instruction are plain and affect substantial rights of the defendant and the fairness of the trial and require a reversal of the case.

Appellant's second specification of error is that the Court erred in failing to properly instruct the jury with reference to certain questions asked by the prosecution. Appellant was asked questions as to whether he had ever sworn that he had not had sexual relations with named women, whether he had ever taken oath that he had not performed illegal operations, whether he had been refused a doctor's license and whether he had kept a mistress. Objections to these questions were made and properly sustained by the Judge who in this regard did everything requested of him by counsel for the defendant. The Judge would no doubt have given a more specific and detailed instruction advising the jury to disregard those questions and the implications arising therefrom had he been so requested.

Whether the instructions the Court did give in this connection were sufficient to protect the defendant need not now be decided inasmuch as the case must be reversed for the reasons already stated.

It is, however, appropriate to express our disapproval of the tactics employed by the government attorney in the prosecution of this case. The government on appeal sought to justify these prejudicial questions on the ground that the appellant had put his character in issue when he testified he was a member of the Junior Chamber of Commerce and that he had opened a skating rink to help deal with the problem of juvenile delinquency. We cannot agree that this testimony put appellant's character in issue. Furthermore, some of the questions concerning the appellant keeping a mistress were asked of witnesses before appellant ever took the stand.

The appellant was on trial on the charge of attempting to evade or defeat the payment of his income tax. His

guilt or innocence of that charge was the only issue in the case and the questions asked, above referred to, were not relevant in any way to that issue and could only serve to paint the appellant as a scoundrel in the eyes of the jury. The practice of attempting to convict a defendant not of the crime of which he is charged, but rather of being an all round, no good dissolute person, is foreign to our system and is disapproved by this Court.

Appellant's third specification of error is that the jury brought in conflicting verdicts on counts one and two. There is no merit in this specification.

The cause is reversed and remanded for a new trial on Count two of the indictment.

(Endorsed:) Opinion.
Filed Apr. 11, 1955.
Paul P. O'Brien, *Clerk.*

**(2) OPINION ON REHEARING. 223 F. 2d 297**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 14,266

Jun. 14, 1955

---

BERNARD BLOCH, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

---

Upon Appellee's Petition for Rehearing

---

Before: BONE and POPE, Circuit Judges, and MURRAY, District Judge.

PER CURIAM:

The United States has petitioned for a rehearing in this case and introduces its petition by confessing prejudicial error resulting from the prosecutor's cross-examination of appellant concerning illegal operations, fees received from such operations, illicit relations with a named woman, and denial of a medical license. These are the questions to which our opinion alluded in connection with the discussion of appellant's second specification of error. The Government then suggests that since it concedes that a reversal of the appellant's conviction is proper, we should reexam-

ine what we had to say upon the instruction concerning willfulness which we held was plain error and which constituted the basis for our judgment of reversal. The argument is that our views about that instruction are not in line with what this court held in Bateman v. United States, 212 F. 2d 61. It is urged that our decision here is contrary to the decision in the Bateman case where a similar instruction was said not to be prejudicially erroneous when viewed with due regard to the "instructions considered as a whole".

Subsequent to our opinion in this case, another division of this court handed down its opinion in Legatos v. United States, 222 F. 2d 678 (May 12, 1955), which followed the Bateman case. There a similar instruction had been given and the court said, as in the Bateman case, "It is our conclusion that, *considered as a whole* the court's instructions on intent and wilfulness clearly and correctly stated the law and were not such as to mislead the jury." (Emphasis added)

We note also the case of Berkovitz v. United States, 5 cir., 213 F. 2d 468, to which our attention had not been called at the time our opinion was filed.[1] The court there expressly disapproved and held erroneous an instruction not to be distinguished from the one which met with our disapproval in this case. We think that it may fairly be said that no case may be found where any court has specifically approved an instruction such as that involved here. It is obvious that since the decision in Morissette v. United States, 342 U.S. 246, it would be impossible for any court to give that instruction its approval.

As we read the Bateman and the Legatos cases, supra, we think that in substance what was there held is that in view of the additional instructions given in those particular cases, the instruteion there under attack would not be held prejudicially erroneous. But each case presents a

[1] The Government has also neglected to cite that case in its petition for rehearing.

problem by itself. We are not called upon here to express our views as to whether this obviously questionable language was or was not prejudicially erroneous when read in the context of all the other instructions given in the Bateman and the Legatos cases. All that we have held here is that the language of the court criticized was in and of itself erroneous, and in this particular case its prejudicial effect was not cured by the other instructions given.

The instruction with which we are concerned goes to the intent, an essential element of the offense. This is not a case of instructions which are merely ambiguous or confusing or where conflicting instructions deal only with incidental matters in the trial. As stated in Bollenback v. United States, 326 U.S. 607, 613, "A conviction ought not to rest on equivocal direction to the jury on a basic issue." It is with that in mind that we have come to the conclusion that in this particular case, in the light of the specific instructions here given, we cannot say as was said in Bateman and Legatos that the instruction here involved was not prejudicially erroneous.

We therefore find it unnecessary to express any opinion as to whether the court as now constituted would or would not agree with the conclusions reached in Bateman and Legatos; we decide only upon the facts involved in the case before us. Since we find no occasion to express either agreement or disagreement with the decisions in Bateman and Legatos, we find no occasion to recommend, as we might otherwise do, that the present case be reheard before the court sitting en banc.

The petition for a rehearing is denied.

(Endorsed:) Opinion on Petition for Rehearing. Filed Jun. 14, 1955. PAUL P. O'BRIEN, *Clerk*.

No. 14266

# In the United States Court of Appeals for the Ninth Circuit

BERNARD BLOCH, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA*

## PETITION OF THE APPELLEE FOR REHEARING


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FILED

MAY 10 1955

PAUL P. O'BRIEN, CLERK

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# In the United States Court of Appeals for the Ninth Circuit

No. 14266

BERNARD BLOCH, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA*

## PETITION OF THE APPELLEE FOR REHEARING

The United States of America, appellee, respectfully requests that a rehearing be afforded in the above-entitled cause. In making this request, appellee seeks not affirmance of the conviction but modification of the Court's opinion of April 11, 1955.

The Court based its judgment of reversal on the finding that two of the trial court's instructions on "willfulness," given without objection by appellant at trial or even specification as error on appeal, constituted plain error affecting substantial rights. The Court also noted its disapproval of certain cross-examination by the Government prosecutor but did not find it necessary to decide whether this questioning amounted to prejudicial error because of its previous holding in respect to the instruction points.

The Government agrees with the correctness of the Court's reversal of the conviction but does so on the sole ground that reversal is warranted by the prejudicial error resulting from the prosecutor's cross-examination of appellant concerning (1) performance of illegal operations, (2) reporting of fees received from such operations, (3) indulgence in illicit relations with one Irene Crocker, and (4) denial of a medical license. Appellee respectfully insists, however, that there was no error in the trial court's instructions on intent and certainly no fundamental error therein. Accordingly, it is urged that the Court's judgment should stand but its reasoning in support thereof should be modified.

The Court has premised its judgment herein entirely on issues not previously raised by either party to this proceeding. A rehearing in the cause would therefore be highly appropriate in order to provide opportunity to supply the Court briefs and argument on those issues, hitherto untreated, that have now assumed determinative importance. Such a procedure would conform to the apparent objectives of Rule 18 (2) (d), Rules of the United States Court of Appeals for the Ninth Circuit. See, e. g., *Gordon* v. *United States,* 202 F. 2d 596, certiorari denied, 345 U. S. 998.

1. Although expressing its disapproval, the Court did not decide whether certain questions asked appellant on cross-examination concerning (a) performance of illegal operations (R. 382), (b) reporting of fees from illegal operations (R. 383), (c) illicit relations with named women (R. 380, 383) and (d)

refusal of a license to practice medicine (R. 384) constituted prejudicial error. In the same vein, the Court noted but did not pass on the prejudicial effect of questions asked the witness, Miss or Mrs. Nona Jokela (R. 128, 284), on cross-examination regarding cohabitation with appellant (R. 293–294) and trips made with him (R. 294). This examination occurred "before appellant ever took the stand" (Op. 7). These two distinct lines of questioning are discussed herein in reverse order.

The Government respectfully asserts that the questions put to the witness, Jokela, were proper cross-examination, *not* as attempts to elicit evidence bearing on *appellant's character,* but as relating to the issue of Jokela's credibility as a witness, more particularly to the question of her *bias* in appellant's favor. In evaluating the propriety of the questioning under consideration, it is important to note that the witness, under examination by appellant's counsel, had previously assumed full responsibility for initiating the record-keeping system employed by appellant (R. 128) and for the recording and handling of all patient fees (R. 130–132, 291–292). Appellant later testified to precisely the same effect. (R. 312–314.) The reporting of such fees for tax purposes was, of course, a principal issue of contention in the prosecution. The thrust of Jokela's testimony was entirely exculpatory of the appellant and therefore furnished adequate basis for cross-examination calculated to show bias occasioned by the witness' relationship to him. Questions concerning traveling (R. 294), residence (R. 293–294), and even cohabitation (R. 380) with ap-

pellant were proper subjects of cross-examination of both Jokela and appellant, not to show the bad character of either of them, but to show testimonial bias of the former. *Alford* v. *United States,* 282 U. S. 687, 692, 693–694; *Majestic* v. *Louisville & N. R. Co.,* 147 F. 2d 621, 627 (C. A. 6th); *Ewing* v. *United States,* 135 F. 2d 633, 638, 640 (C. A. D. C.), certiorari denied, 318 U. S. 776; *Kroger Grocery & Baking Co.* v. *Stewart,* 164 F. 2d 841, 844 (C. A. 8th); III Wigmore on Evidence (3d ed.), Secs. 948, 949.

On direct examination, appellant testified as to his concern with the problem of juvenile delinquency extant in his community and as to his personal efforts and substantial financial contribution directed to the alleviation of this problem. (R. 309–310.) Whether this self-glorifying line of testimony was relevant or material is open to question. But appellant's credibility in this respect was a proper predicate for cross-examination concerning whether he had experienced sexual relations with a particular juvenile. (R. 383.) *Walder* v. *United States,* 347 U. S. 62; *United States* v. *Bowcott,* 170 F. 2d 173, 176–177 (C. A. 7th); III Wigmore on Evidence (3d ed.), Sec. 891. To this extent the Government's cross-examination would not appear to have been erroneous and certainly not prejudicially erroneous.

The Government concedes, however, that the balance of the questions concerning (1) illegal operations by the appellant (R. 382), (2) the reporting of fees from such operations (R. 383), (3) his illicit relations with one Irene Crocker (R. 383), and (4) the refusal of a medical license to appellant (R. 384) were prej-

udicial. The prosecutor obviously asked these questions in the good faith belief that appellant's testimony concerning his past-presidency of the Junior Chamber of Commerce (R. 308–309), his construction of a skating rink to curb juvenile delinquency (R. 309–310), and his free medical services to indigent Mexicans (R. 310–312) had placed his character in issue. This Court correctly held that such testimony did not inject the defense of good character. (Op. 7.) No character evidence in the "reputation" sense of the word was offered. *Michelson* v. *United States*, 335 U. S. 469, 476–477. And absent such character evidence, "the state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *Id.* p. 475. On this basis, the Government agrees that the reversal of the appellant's conviction is proper.

2. The trial court's instructions on "willfulness" were not error. In any event, those instructions did not constitute plain error. *Bateman* v. *United States*, 212 F. 2d 61 (C. A. 9th).

In the course of its careful and comprehensive charge, the court, in six distinct instances,[1] instructed

[1] "There are various schemes, subterfuges, and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax." (R. 409.)

"The attempt to evade and defeat the tax must be a willful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws, which

the jury that to convict they must find that appellant intended to evade the payment of his income tax. Situated among those instructions was the following sentence (R. 410):

> The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly, and intentionally did not set up his income, and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax.

The Court has noticed this sentence as fundamental error affecting substantial rights because the trial court told the jury, in effect, "that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return." (Op. 5.) The Government respectfully submits that this characterization of the instruction in question

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it was the duty of the defendant to pay to the Government." (R. 410.)

"The attempt must be willful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant." (R. 410.)

"It is sufficient if you find beyond a reasonable doubt that the defendant received a substantial part of the income which he is charged with receiving and that he wilfully and intentionally attempted to evade or defeat a substantial portion of the taxes alleged to have been due in the indictment." (R. 412.)

"If you find that a fraudulent return was filed, with intent to defeat a part or all of the tax due, and this was done wilfully, the crime is complete as soon as the filing takes place." (R. 413.)

"Before finding him guilty, you must be satisfied from the evidence that any omissions on his part were made wilfully, and with intent to evade and defeat taxes due for the calendar years 1947 and 1948 to the Government." (R. 415.)

completely denies effect to the words "consciously, knowingly, and intentionally." If given effect, these words effectively preclude the construction that the Court has suggested. This Court has, itself, recently rejected such a construction. In *McFee* v. *United States,* 206 F. 2d 872 (C. A. 9th), the identical instruction was given (McFee R. 419) and not deemed plain error or error at all. In *Bateman* v. *United States, supra,* considering essentially the same question with which we are dealing here, this Court said (pp. 69–70):

> Appellants argue that the giving of the phrase, "the law presumes that every man intends the natural and probable consequences of his own voluntary acts," in effect instructed the jury that from the mere act of filing an incorrect return it may be presumed that appellants intended to evade their taxes. This is not the ground upon which the instruction was objected to in the trial court. Under Rule 30 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., failure to except to an instruction on the ground urged on appeal foreclosures review of the question. *Berenbeim* v. *United States,* 10 Cir., 1947, 164 F. 2d 679.
>
> Although we would be justified in placing our determination of this question on the failure of appellants to comply with Rule 30, we deem it advisable to point out that the trial court correctly instructed on the element of intent.

The cases of *Wardlaw* v. *United States,* 203 F. 2d 884 (C. A. 5th), and *Morissette* v. *United States,* 342 U. S. 246, cited at page 4 of the Court's opinion, do

not support this Court's conclusion in respect to the instruction under consideration.

In both *Wardlaw* and *Morissette*, the rulings of the trial court had the effect of creating a conclusive presumption of felonious intent and removed from the jury's consideration the defense of bona fide mistake.[2] In direct contrast, the jury here was charged (R. 415):

> In order to convict him, you must first find beyond a reasonable doubt that he did so fail to report taxable income as charged, and that such failure was willful and intentional. The criminal law does not punish innocent mistakes, inadvertent errors, or mere negligence.
>
> Under the indictment in this case the accusation is made that the defendant acted wilfully, that is, with a bad purpose, and not merely mistakenly or carelessly.
>
> Before finding him guilty, you must be satisfied from the evidence that any omissions on his part were made wilfully, and with intent to evade and defeat taxes due for the calendar years 1947 and 1948 to the Government.

In *Wardlaw* and *Morissette*, the point was preserved in the record by proper objection. No such objection was made here. (R. 420.)

The Court in *Wardlaw* (203 F. 2d, p. 887, fn. 5) recognized, by its reference to *Grayson* v. *United States*, 107 F. 2d 367, 370 (C. A. 8th), that the giving of the instruction with which we are here concerned does not of itself constitute a denial of justice. In

[2] The same is true of *Haigler* v. *United States*, 172 F. 2d 986 (C. A. 10th), and *Hubbard* v. *United States*, 79 F. 2d 850, 852–853 (C. A. 9th).

the *Grayson* case, *supra*, involving a prosecution under the Mann Act, the Court of Appeals held a similar instruction not to be prejudicial, since it clearly appeared from a consideration of the charge as a whole that the jury were told to determine the issue of felonious intent from the evidence as a whole. The Court of Appeals said (p. 370):

> The use of the words "presume" or "presumption" in this connection is not to be approved. No doubt *inferences* as to intent may be gathered from subsequent acts and conduct, but no *presumption* of law follows to invade and restrict the province of the jury. However, we do not think the language employed had that effect in the instant case. The question of the particular intent was not treated as a question of law, but as a matter to be submitted to and resolved by the jury. The charge as a whole must be considered. In this same paragraph the jurors are admonished that they would be justified in finding the intent only from all the evidence in the case. * * * [Emphasis supplied.]

We submit that a consideration of the charge and of the proceedings as a whole in the case at bar will satisfy this Court that no conclusive *presumption* of intent was imposed upon the jury. There were no expressions by the trial judge, such as there were in *Wardlaw* and *Morissette*, to indicate that the plea of honest mistake was no defense. On the contrary, the trial judge clearly left it to the jury to determine the presence or absence of willful intent from all the evidence, and the sentence in question, in its proper

context, simply told the jury that intent to evade was one possible *inference* which they might draw from appellant's failure to report all his taxable income.[3]

The trial court instructed specifically that the question of appellant's intent was for the jury to determine from "all of the facts and circumstances shown by the evidence." (R. 410–411.) Moreover, as previously noted, the court repeatedly charged the jury that "willfulness" within the meaning of Section 145 (b) meant intentional evasion of an additional tax owing (R. 409, 410, 412, 413) and specifically charged that mistake, carelessness, inadvertency or negligence did not constitute the intent requisite to conviction (R. 415). *Bateman* v. *United States, supra,* p. 70.

Considered in context, it is apparent that the instruction in question did not operate to withdraw the issue of intent from the jury or in any way inhibit their due consideration of the issue. The Government respectfully submits, therefore, that the instruction given was not error. By no stretch of reasoning can the instruction be considered plain error. Accordingly, appellant's total failure of objection to it forecloses consideration of the question by this Court. Rule 30, Federal Rules of Criminal Procedure. *Bateman* v. *United States, supra,* p. 70; *Gordon* v. *United States, supra.*

3. The court in *Wardlaw* v. *United States, supra,* after noting its disapproval of the instruction given, as previously discussed, set forth the following as a

[3] Whereas the *Wardlaw* instruction was, "* * * the natural *presumption* would be * * *" the instruction in the instant case was: "* * * the natural *inference* would be * * *." (R. 410.)

guide to proper instruction on the issue of intent in a tax fraud case (p. 887):

> The intent involved in this offense is not inherent in the act itself, but is a specific intent *involving bad purpose* and evil motive and *that* specific intent must be proved by or clearly inferred from the evidence. [Citing *United States* v. *Murdock*, 290 U. S. 389.] [Emphasis supplied.]

In the case at bar the jury was instructed (R. 410):

> Wilfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. It includes several states of mind, any one of which may be the willfulness to make up the crime.
>
> Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with careless disregard for whether or not one has the right so to act.

In ascribing basis for reversal to the above instruction, it appears that this Court now considers plain error precisely that which the court in *Wardlaw* held essential to a proper charge on the question of willfulness. More important, the court's holding in this respect is at absolute variance with consistent precedent in this Circuit.

According to the Government's understanding, the Court reached its conclusion on the following reasoning:

a. The instructions under review were taken from *United States* v. *Murdock*, 290 U. S. 389, 394.

b. The *Murdock* case concerned a willful failure to supply information, in violation of the misdemeanor provision that ultimately became Section 145 (a) of the Internal Revenue Code of 1939. Therefore, the definitions of willfulness contained in the opinion are inapposite to a felony charge of income tax evasion in violation of Section 145 (b) of the 1939 Code.

c. In deciding *Murdock* the Supreme Court did not apply the definitions of willfulness set forth in its own opinion in the case, those being the same definitions utilized by the trial court in the instant case.

Unquestionably, as the Court has suggested, the instruction with which we are here concerned was patterned after the language of the Supreme Court in the *Murdock* case.

Although the *Murdock* case concerned a prosecution on misdemeanor charges of willful failure to supply information, it is clear that the Supreme Court's various definitions of willfulness, given within that context, are equally applicable to the felony charge here involved. The Supreme Court itself has made this fact clear by its subsequent decision in the case of *Spies* v. *United States*, 317 U. S. 492. In that case the Court undertook to distinguish the misdemeanor offenses of Section 145 (a) from the felony offense established by Section 145 (b). It is significant to note that although the Court indulged in considerable discussion of the element of willfulness involved in

the two types of offenses (pp. 497–498), it did not rest its distinction on that basis. Rather, the Court said (p. 498):

> The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term "attempt," as used in the felony subsection. * * *

In *Friedberg* v. *United States*, 207 F. 2d 777 (C. A. 6th), affirmed, 348 U. S. 142, an income tax evasion case under Section 145 (b), the trial court charged (*Friedberg* R. 648):

> As to all counts, if any, you find the Government has proved beyond a reasonable doubt, the defendant attempted to defeat or evade the tax, you must next consider whether or not such attempted evasion, if any, was willful. In this connection the Court instructs you that the word "willful" means not only intentional or knowing, but "done with a bad purpose * * * without justifiable excuse * * * stubbornly, obstinately, and perversely."

Of the trial court's instructions in *Friedberg* the Court of Appeals said (p. 777):

> * * * the court delivered to the jury a clear and correct charge, in which the rights of appellant were fully protected with extreme care, * * *.

In reviewing the conviction the Supreme Court found no error at all in the trial court's instructions, to say nothing of plain error.

The definition of willfulness used by the trial court in the case at bar was, in substance, applied to the *Murdock* case, *supra*, by the Supreme Court.

In *Murdock* the Supreme Court was called upon to decide whether a willful refusal to supply information meant merely a voluntary or intentional refusal, as the trial court had charged, or whether it meant something more. In holding that in a criminal statute the term did mean something more than knowing or non-accidental, the Court advanced five wholly generic definitions, each supported by authority, among which were included those definitions used by the trial court in the instant case. Having done this, the Court separately defined "willfully" as meaning an act done with "evil motive." This definition was taken from *Felton* v. *United States,* 96 U. S. 697, 702, the same case from which the Court had taken "bad purpose," the first of the five generic definitions enumerated. The fact that in its ultimate holding in *Murdock* the Supreme Court used the terms "bad faith" or "evil motive" rather than "bad purpose" or "without justifiable excuse" is a distinction without difference. The sundry alternative definitions of willfulness presented by the Supreme Court in its opinion in *Murdock* were not idle obiter but were clearly intended as relevant to the decision reached and were obviously applied, in substance, in reaching that decision.

On page 6 of its opinion this Court says:

> In this Section 145 (b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade

> or defeat the payment of the income tax that is due. Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section. * * *

However correct these observations may be, they do not fit the facts of this case. They ignore the fact that, as previously indicated, on six separate occasions the jury was told that the intent requisite to conviction entailed an intentional evasion of an outstanding tax liability. Here the jury was not told, singularly, that under the offense charged, willfully meant filing a false return with a "bad purpose" or "without justifiable excuse." Rather, these descriptive terms of mental state were given the jury within a total framework of instruction permeated with the principle that, to be found guilty, appellant must have intended to evade his true tax liability. The instruction in question should not be isolated from the charge as a whole. *Bateman* v. *United States, supra,* p. 70. If considered in context the instruction is not error.

In *Himmelfarb* v. *United States,* 175 F. 2d 924 (C. A. 9th), the trial court had charged (Himmelfarb R. 1578–1579):

> The word "wilfully" as used in the indictment and throughout these instructions simply means an intentional, conscious doing of the act prohibited, that is, intending the result which actually came to pass without ground for believing that it was lawful, or conduct marked

> by a careless disregard as to whether it is lawful or not, or deliberate unwillingness to discover and obey the law. Or, to express it another way, it means an act done with a bad purpose or with an evil motive to accomplish what the statute prohibits, without regard to what the law provides. * * *

In the *Himmelfarb* case, *supra,* this Court said in affirming the conviction (p. 951):

> The jury was fully instructed on requirements of proof, the element of wilfulness and the statute charged to have been violated.

This Court has previously approved an instruction almost the same, verbatim, as that here involved. In *O'Connor* v. *United States,* 175 F. 2d 477 (C. A. 9th), the instruction on intent was (Appellant's Br. 126–127):

> "Wilful" in the statute which makes a wilful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. It includes several states of mind, any one of which may be the wilfulness necessary to make up the crime. Wilfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful, and it also includes doing an act with careless disregard for whether or not one has the right to so act.

In *O'Connor* v. *United States, supra,* this Court affirmed the conviction stating (p. 479):

> The Court's instructions were full and fair and no objections were made to them when given as required by Rule 30 * * *.

In view of the foregoing, particularly the decisions of the Supreme Court and this Court, it is clear that there was no error in the trial court's charge on willfulness. Certainly there was no plain error therein. There having been no objection at trial to the court's instructions on that issue and no specification of them as error on appeal, they cannot serve as basis for reversal of the conviction. *Mitchell* v. *United States,* 213 F. 2d 951, 957 (C. A. 9th), certiorari denied, 348 U. S. 912; *Benatar* v. *United States,* 209 F. 2d 734, 744–745 (C. A. 9th), certiorari denied, 347 U. S. 974; *Kobey* v. *United States,* 208 F. 2d 583, 587–588 (C. A. 9th); *Bateman* v. *United States,* 212 F. 2d 61 (C. A. 9th); *O'Connor* v. *United States, supra; Gordon* v. *United States,* 202 F. 2d 596 (C. A. 9th), certiorari denied, 345 U. S. 998; and *Lash* v. *United States* (C. A. 1st), decided April 7, 1955 (1955 C. C. H., par. 9344).

## CONCLUSION

Although the Court's judgment in this cause is correct, it is respectfully urged that the premises on which it rests are erroneous.

Wherefore, it is requested that this petition for rehearing be granted and the opinion of April 11, 1955, be appropriately modified.

Respectfully submitted.

H. BRIAN HOLLAND,
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ELLIS N. SLACK,
JOHN H. MITCHELL,
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GEORGE WILLI,
*Special Assistants to the Attorney General.*

JACK D. H. HAYS,
*United States Attorney.*

MAY 1955.

## CERTIFICATE OF COUNSEL

The undersigned, attorneys for the United States of America, petitioner herein, hereby certify that the foregoing petition is not presented for the purpose of delay or vexation but is, in the opinion of counsel, well founded and proper to be filed herein.

H. BRIAN HOLLAND,
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ELLIS N. SLACK,
JOHN H. MITCHELL,
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U. S. GOVERNMENT PRINTING OFFICE: 1955

## APPENDIX G

### SUPPLEMENTAL DISSENTING OPINION OF STEPHENS, J., JUNE 23, 1956; RECEIVED IN WASHINGTON, JUNE 27, 1956

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 14,611

SUPPLEMENTAL OPINION

June 23, 1956

J. A. HERZOG, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the Northern District of California,
Southern Division

[.....]

Before: DENMAN, Chief Judge, STEPHENS, HEALY, BONE, ORR, POPE, LEMMON, FEE, and CHAMBERS, Circuit Judges.

STEPHENS, in Supplemental Opinion, Dissenting.

Opinion with the decision of the case by this court sitting *en banc* were filed May 29, 1956.

Because of widely divergent views held by members of this court, both as to the merits of one issue of the case, and as to procedure, this case suffered considerable delay in decision. I had prepared a dissent to Judge Healy's opinion when Chief Judge Denman's opinion, concurring upon a ground that I had wrongly assumed had been abandoned, reached me. I was at the time engrossed in other matters so, in order to avoid further delay, I merely added to my opinion that I reserved the privilege of responding to Chief Judge Denman's opinion at a later date.

In this supplemental opinion I have italicized the words "*en banc*" and "*division*" in order to more readily distinguish the two ways in which the court of appeals sits.

Before going into my comment as to the Chief Judge's concurrence, I will merely note that Judge Fee is in accord with my first dissent, but he has not seen my reply to Chief Judge Denman.

Judge Chambers apparently agrees with my original dissent, and has not seen this supplemental opinion. He suggests a possible way out of the dilemma, but adds, "This has not been done." The possible way out suggested by Judge Chambers is not Chief Judge Denman's way out.

The Chief Judge in his opinion, as well as the majority, if I understand him, thinks that the circuit court *en banc* can accept from a statutory *division* of the circuit court a portion of an appeal pending in the *division* and, without considering any other portion of the appeal, decide the whole appeal by applying some unexpressed method of integrating the *en banc's* decision on the one portion, with the *division's* decision on all the remaining portions.

And it must be understood that the Chief Judge does not contend that the court *en banc* has any advisory power over a *division*. It seems, under the Chief Judge's theory and that of the majority, that the decision of the *division* fades out entirely as the decision on appeal. The decision is the *en banc's*.

The appeal in this case raised numerous points, and the *division* thought none good and affirmed the judgment of conviction. However, on petition for rehearing, the *division*, without divesting itself of the case, granted a limited rehearing and asked the *en banc* court to rehear one point only, in order to resolve a possible conflict in our *divisions*. The *en banc* court accepted and heard the one issue, but did not resolve the conflict. It merely held as to the point it took over that, if there was an instruction

contrary in point of law to a ruling in a former case, it was of no importance because the instructions as a whole, with the applicable evidence in the case upon the one point, was not prejudicial.

The judges thereupon entered their *en banc* decision, affirming. I said in my main dissenting opinion that the judgment of the *division* affirming the district court has never been set aside and I asked the following question:

> "How the court's en banc majority opinion-decision is designed to be integrated with the Division's, it is impossible to know."

Since the opinion wherein I asked the question was filed, the *en banc's* affirmation of the district court has been filed and the formal entries on the clerk's official minutes show the two official affirmances. My question stands without answer. However, I do not give controlling effect to the mere fact that the two decisions stand on the clerk's book. I suppose, if the *en banc's* decision is good, it would supersede the *division's* decision.

The Chief Judge Denman likens what the *en banc* court has done, to the writ of certiorari, as used by the United States Supreme Court. I think there is much fundamental difference.

First, an appeal to the court of appeals is a statutory right of litigants. There is no such right relating to the Supreme Court in this case and it can be reviewed by the Supreme Court only through the permissive writ of certiorari.[1]

---

[1] See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 1955, 349 U.S. 70, wherein it is said at p. 74: "Nor does it [the United States Supreme Court] sit for the benefit of the particular litigants." And again, at page 79, Mr. Chief Justice Taft is quoted: "* * * * [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties * * *." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393."

Second, every active member of the court, when sitting *en banc*, and each of the three members, when sitting in *division* as the court, has the duty of considering every point raised on appeal until and unless the court reaches a point absolutely requiring reversal. The Supreme Court, under its own limiting rules, need take only such cases for appellate review, or such portion of cases for appellate review, as it thinks proper. If it grants certiorari on a limited point of the case, it rules on the point and returns the case to the lower court with instructions to consider the whole case with the Supreme Court's view of the limited point. However, if, as in the case of *Dennis v. United States*, 1951, 341 U.S. 494, cited by Chief Judge Denman, the one point upon which certiorari is granted is necessarily decisive of the case, it decides the case. Thus, in *Dennis*, supra, the one point was the constitutionality of the *Smith Act*. In considering the issuance of certiorari, it had the whole case before it, but refused to grant the writ except upon the constitutional point. Our court must take the whole appeal. If the Supreme Court had found other points worthy of its consideration and had granted certiorari in general, upon determining that the *Smith Act* was constitutional, the court would have proceeded to the other questions and ruled upon all issues of the appeal.

In our case, the court of appeals, *en banc*, though it had but one phase of the case before it, found no reversible error in the point considered but, without considering and without the right of considering any of the several other points urged as requiring reversal, entered its affirmation of the judgment. Had the whole case been referred to the court *en banc* under our rules, it is altogether possible that the court would have found reversible error in one or more points on appeal. I do not hint that such reversible error was present, I don't know, never having had the other points before me.

I have suggested in my main dissenting opinion an orderly manner under our rules in which to resolve conflicts between the *divisions* of our court. It is possible that the whole court, by majority vote, has the inherent power to grant rehearings in any case on appeal. Chief Judge Denman and Judge Pope have ever so contended. But, even so, I think such power would not encompass what the court has done in this case.

I think the foregoing plainly shows that the Chief Judge was wrong in saying, as he did in his opinion,

> "It is apparent that a rehearing en banc of a division's decision is identical in all material respects with the reviewing by the Supreme Court of a case decided by a court of appeals, by its certiorari order."

And, as to his statement after quoting § 1254(1) of Title 28 U.S.C., I think he was wrong again in saying,

> "In both courts the reviewing is a matter of the court's discretion."

In the court of appeals the reviewing of a judgment, when an appeal has been taken, is a *must*. In the United States Supreme Court, the reviewing is a matter of discretion exercised through the petition for the writ of certiorari. Of course, when either court is actually reviewing any point in any case, it applies its discretionary judgment.

As I stated in my main dissenting opinion, I would rescind our court *en banc's* action and send the one issue back to the *division*. Then, if the *division* sees fit to request the court *en banc* to take over the whole case and decide it, I would vote for the court *en banc* to conform to such request.

(Endorsed:) Supplemental Opinion of STEPHENS, C. J. Filed June 23, 1956. PAUL P. O'BRIEN, *Clerk*.

# PETITION

# FOR

# REHEARING

No. 208

# No. 14,611

IN THE

# United States Court of Appeals

## For the Ninth Circuit

J. A. HERZOG,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

**On Appeal from the United States District Court for the Northern District of California.**

## APPELLANT'S PETITION FOR A REHEARING and MOTION TO STAY MANDATE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,611

IN THE

# United States Court of Appeals

## For the Ninth Circuit

J. A. HERZOG,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

## APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Clifton Mathews, Richard H. Chambers and William M. Byrne, Judges of the United States Court of Appeals for the Ninth Circuit:*

Comes now the appellant in the above-entitled case, and respectfully prays the Court to grant a rehearing.

I. The principal question in the present posture of the case is whether the trial judge's charge to the jury on willfulness was correct, and whether, not having been objected to under Criminal Rule 30 at the trial, this Court on appeal may consider the alleged error under Criminal Rule 52(b).

In *Bloch v. United States*, 221 F. 2d 786, a division of this Court (Bone and Pope, Circuit Judges; Mur-

ray, District Judge), held an identical instruction to be erroneous, held that it could be considered in the absence of objection below, and reversed the conviction.

In *Brown v. United States,* 222 F. 2d 293, another division of this Court (Stephens and Fee, Circuit Judges; Wiig, District Judge) held that there was no power to consider errors not objected to below.

In the instant case, still a third division of this Court (Mathews and Chambers, Circuit Judges; Byrne, District Judge), disagreed with the *Bloch* case and agreed with the *Brown* case, "which was decided three days after and overrules *sub silentio* the *Bloch* case" (p. 7 of slip opinion). Judge Chambers concurred, saying (p. 11 of slip opinion), "Although I disagree with the decision in the Bloch case, I would be reluctant to go against it were it not for my belief that Brown v. United States, 9 Cir., 222 F. 2d 293, already has overruled Bloch sub silentio."

II. *Bloch* was decided on April 11, 1955, *Brown* on April 14, 1955. The Government petitioned for a rehearing in the *Bloch* case. If *Brown* had overruled *Bloch,* then, obviously, that petition for rehearing should have been granted. In fact, it was denied on June 14, 1955, in an opinion reported at 223 F. 2d 297.

If therefore it can properly be said that *Brown* overruled *Bloch sub silentio* when rendered by a different division of this Court three days later, then it can be contended with equal force that *Brown* was in

turn overruled *sub silentio* by the denial of the Government's petition for rehearing in *Bloch* two months after that.

III. There can be no disagreement with what was said in the prevailing opinion in this case (p. 7 of slip opinion): "The *Brown* case and the *Bloch* case cannot both be right."

In our view, the *Bloch* case, which held that failure to object under Rule 30 was no bar to the invocation of Rule 52(b) by the Appellate Court, is correct. That view has the support of no less than six other circuits.

*First Circuit: Daigle v. United States,* 181 F. 2d 311, 313 (instruction not objected to below considered by the Appellate Court); *Lash v. United States,* 221 F. 2d 237, 240, certiorari denied, 350 U. S. 826 (no conflict between Rules 30 and 52(b); they are to be construed together).

*Third Circuit: United States v. Cumberland,* 200 F. 2d 609 (judgment reversed for errors in instructions not objected to at the trial); *United States v. Ward,* 168 F. 2d 226, 228 (plain error in instructions can be noticed though not called to Court's attention at the trial).

*Sixth Circuit: Lazarov v. United States,* 225 F. 2d 319, 329 ("No exception was taken to the instruction but, of course, an appellate court will consider an error in the charge which is seriously prejudicial or amounts to a grave miscarriage of justice even though no objection was made in the trial court.").

*Seventh Circuit: United States v. Vasen,* 222 F. 2d 3, 5-6, certiorari denied, 350 U. S. 834 (Rules 30 and 52(b) to be construed together in cases of glaring errors); *United States v. Raub,* 177 F. 2d 312, 315 (erroneous instruction may be noticed under Rule 52(b) notwithstanding failure to comply with Rule 30).

*Tenth Circuit: Apodaca v. United States,* 188 F. 2d 932, 937 (Rules 30 and 52(b) to be construed together).

*District of Columbia Circuit: Robertson v. United States,* 171 F. 2d 345 (plain error in instructions will be noticed though not called to Court's attention at the trial).

There are indications in other decisions of this Circuit that support the *Bloch* rule. See *Remmer v. United States,* 205 F. 2d 277, 290, note 16:[1] "Plain error in instructions should of course be noticed regardless of whether the matter was properly brought to the attention of the trial Court." (Mathews, Stephens, and Orr, Circuit Judges.) Compare *Jones v. United States,* 175 F. 2d 544 (plain error noticed; no showing of compliance with Rule 30) (Mathews, Healy, and Pope, Circuit Judges).

And, in a case decided shortly after the adoption of the Federal Rules of Criminal Procedure, the Supreme Court cited Rule 52(b) to reach and reverse

[1]Judgment vacated on other grounds, 347 U.S. 227; reaffirmed, 222 F. 2d 720 (C.A. 9); certiorari granted, Oct. 10, 1955 (350 U.S. 820), and now pending in the Supreme Court as No. 156, Oct. T. 1955.

for an erroneous instruction to which no exception had been taken at the trial. *United Brotherhood v. United States,* 330 U.S. 395, 411-412.

Finally, the Rules Committee's notes show that the interpretation placed on Rule 52(b) by most of the circuits and by the *Bloch* ruling in this Circuit, viz., that the rule enlarges the power of the appellate tribunal, was precisely the one intended: "The concept of plain error has served to relieve the harshness of the general rule that an appellate court will not consider alleged errors to which objection and exception were not interposed at the trial." *Preliminary Draft, Federal Rules of Criminal Procedure* (May 1943), p. 198; *Second Draft, Federal Rules of Criminal Procedure* (February 1944), p. 186. In the light of this expressed purpose, we submit that it is not open to conclude that an Appellate Court lacks power to consider an erroneous instruction not objected to at the trial.

We think, therefore, that both the *Brown* case and the prevailing opinion in this case read Criminal Rule 52(b) too restrictively.

IV. What seems to us particularly disturbing about the affirmance in this case is that it applies one rule to *Bloch* in April and June and another to this appellant in October in substantially identical circumstances; for every element present in the *Bloch* case was present in this case also.

1. The charge condemned in the *Bloch* case was as follows (221 F. 2d at 789):

> "Wilfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. *It includes several states of mind, any one of which may be the willfulness to make up the crime.*
>
> "*Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act.*" (Italics in original.)

The corresponding charge in this case was as follows (R. 1703-1704):

> "Now, when we use the term 'Wilful' in speaking of a violation of this statute, as used in this criminal statute and as used in most criminal statutes, we mean an act done with a bad purpose without justifiable excuse, or stubbornly or obstinately or perversely. It may be used to characterize an act done without grounds for believing it is lawful, or conduct marked with completely careless disregard of whether one has a right to do that or not."

The two passages are almost *in haec verba*, without any difference whatever in substance.

2. Appellant in *Bloch* raised no objection to the passage just quoted; appellant here, similarly, raised no objection to the quoted portion of the charge in this case.

Appellant in *Bloch* requested another instruction on willfulness, duly excepted to the failure to give it,

and briefed the issue on appeal; this Court held that the requested instruction was erroneous. (*Bloch* opinion, 221 F. 2d at 787.)

Appellant here requested other instructions on willfulness (Nos. 18 and 19, R. 25-26), excepted to the failure to give them (R. 1711), assigned the failure as error (Point 12(c), R. 1727-1728), but did not brief it further.

3. The question of intent was of critical importance in both cases. Appellant here conceded that the profit on eleven sales of "executive" or "house" cars in 1948 was not reported but contended that the omission grew out of Smith's manipulation of these particular automobiles in the course of his embezzlement rather than from any intent to evade taxes. (See Appellant's Opening Brief, p. 5.) The Government, for its part, similarly stresses the importance of this item in the alleged "pattern" of evasion. (See U. S. Br., pp. 9-10, 30-34.) The jury might well have thought that the failure to trace the disposition of these eleven cars after Smith was discharged was a "careless disregard" of appellant's obligations, which, under the Court's instruction, would be tantamount to willful evasion.

4. The factual setting in this case is identical with that in *Bloch*: the same instruction, the same lack of objection, the same kind of case. The question is not whether the appellant here would have had standing as an original proposition to assail the instruction in this case after having failed to object to it at the trial. Nor is the question whether, as an

original proposition, the instruction was so glaringly wrong as to call for an exercise of this Court's power under Rule 52(b) to notice "plain error". Rather the question is whether, after reversing for fundamental error as to the instruction on willfulness in the *Bloch* case, and after denying the Government's petition for rehearing there, this Court can now affirm in this case on the same instruction in the identical factual setting. We submit that affirmance of the present judgment in these circumstances would amount to a discrimination so unjustifiable as to infringe the Due Process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499.

V. We therefore respectfully suggest, pursuant to the third paragraph of Rule 23 of this Court, that it would be eminently appropriate for this case to be heard en banc, to the end that the important questions of federal criminal law which are left in doubt by conflicting decisions of different divisions of this Court may be authoritatively resolved.

VI. In the event that a rehearing is granted, appellant desires to reargue two additional questions, which are here summarily stated in order not further to lengthen this petition:

1. *The admissibility of the Kelley Blue Books* (Specifications of Error Nos. 2 and 6). Very briefly, the opinion of the Court (slip opinion, pp. 2-3) proceeds on grounds which suggest that an insufficient foundation was laid for the admission of these books, whereas the trial judge, in explicit and unequivocal fashion, based his ruling entirely on materiality. (R. 1521.)

We believe that, in their setting, the Blue Books had substantial probative value. For 1948, the conviction year, almost all of the used car sales were made to Joe Angel; the Blue Book valuations for the cars sold to him in that year aggregated $35,785, as against $39,245 which Angel claims he paid, and the $34,720 shown on appellant's invoices and records. (Def. Ex. AB for id., p. 4, R. 1789.)[2]

It follows that the exclusion of the Blue Books on the ground of materiality alone amounted to prejudicial error. Moreover, we submit, when a trial judge states (R. 1521), "I will protect the record on that and state that the basis of the ruling has nothing to do with the laying of a foundation as to any document whatsoever", it is not open to an Appellate Court to sustain his ruling on any ground going to a lack of foundation.

2. *The request for examination of the Grand Jury minutes* (Specifications of Error Nos. 8 and 9). The Court's opinion on this point (slip opinion, pp. 4-6) proceeds on two grounds, neither of which we submit is tenable on closer analysis.

Insofar as the opinion suggests that the trial judge was not required to inspect the minutes himself in the absence of a specific request that he do so, the ruling is contrary to what appears to be settled practice elsewhere. See *United States v. Cotter*, 60 F. 2d 689, 692 (C.C.A. 2), where, although the request was

[2]The Blue Book calls for reduction of the price by the estimate of reconditioning cost, but appellant sold used cars at wholesale as is, without reconditioning. (R. 1367-1369.)

for a general inspection of grand jury minutes by counsel, which was refused, the judge "went over them himself, decided what parts were relevant, and laid so much open."[3]

Insofar as this Court's opinion holds that a defendant may neither see nor request the trial judge to examine grand jury minutes for purposes of impeachment until he can first show that those minutes will be impeaching, it establishes a prerequisite for examination utterly impossible of attainment; for, plainly, such a requirement cannot reasonably be imposed in respect of an unknown document. *United States v. Krulewitch,* 145 F. 2d 76, 79; *United States v. Cohen,* 145 F. 2d 82, 92; both C.C.A. 2.

VII. Rehearing is not sought in respect of any other questions.

Dated, Oakland, California,
November 9, 1955.

Respectfully submitted,

FREDERICK BERNAYS WIENER,
SPURGEON AVAKIAN,
J. RICHARD JOHNSTON,
*Attorneys for Appellant and Petitioner.*

---

[3]A recent Second Circuit case approved the application of the same practice to F. B. I. reports. *United States v. Lebron,* 222 F. 2d 531, 536-537, certiorari denied, 350 U.S. ..... (Oct. 24, 1955; No. 139, Misc.)

## Certificate of Counsel

I, Spurgeon Avakian, one of the attorneys for the appellant, certify that this petition is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

Dated, Oakland, California,
November 9, 1955.

Spurgeon Avakian.

No. 14,611

IN THE

# United States Court of Appeals
## For the Ninth Circuit

---

J. A. HERZOG,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

**On Appeal from the United States District Court for the Northern District of California.**

## APPELLANT'S MOTION TO STAY MANDATE.

---

*To the Honorable Clifton Mathews, Richard H. Chambers and William M. Byrne, Judges of the United States Court of Appeals for the Ninth Circuit:*

The appellant, J. A. Herzog, hereby respectfully moves this Court, in the event that his petition for rehearing in the above-entitled cause is denied, for an order staying the issuance of the mandate in said cause for a period of thirty (30) days after denial of said petition (or such additional time thereafter as may be fixed by the Supreme Court or a justice thereof), in order to allow appellant to prepare and file

with the Supreme Court a petition for a writ of certiorari, and thereafter until such time as said petition for a writ of certiorari may be granted or denied and, if granted, until the final determination of the cause.

Dated, Oakland, California,
November 9, 1955.

FREDERICK BERNAYS WIENER,
SPURGEON AVAKIAN,
J. RICHARD JOHNSTON,
*Attorneys for Appellant and Petitioner.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1956

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No. 208

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J. A. HERZOG, *Petitioner*

v.

UNITED STATES OF AMERICA

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the Court of Appeals on the original hearing (Pet. App. A1-A13) is reported at 226 F. 2d 561. The opinions on rehearing *en banc* (Pet. App. A14-A28, G) have not yet been reported. The opinion of Mr. Justice Douglas granting bail pending appeal is reported at 75 Sup. Ct. 349 and 99 L. Ed. 1299.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1956. (Pet. App. A31-32.) The petition for certiorari was filed on June 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED

1. Whether the "divergent" rulings of the court below in this case and in a prior case (*Bloch* v. *United States*) amount to such a denial to petitioner of equal justice under law as to call for an exercise of this Court's power of supervision.

2. Whether the trial court erred in denying petitioner's request to inspect the minutes of the grand jury testimony of two Government witnesses.

3. Whether the trial court erred in excluding copies of a trade publication containing suggested market prices of used cars, where part of the alleged unreported income consisted of side payments on the sale of used cars.

## STATUTE AND RULES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who willfully

attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

Federal Rules of Criminal Procedure:

RULE 6. THE GRAND JURY

* * * * *

(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. * * *

* * * * *

RULE 30. INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the re-

quests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

## STATEMENT

On March 9, 1954, an indictment in three counts was returned against petitioner in the United States District Court for the Northern District of California charging violations of Section 145(b) of the Internal Revenue Code of 1939. The first and second counts alleged that petitioner wilfully attempted to defeat and evade income taxes due and owing by himself and his wife, respectively, for the year 1947; the third count charged evasion of their joint income tax for 1948. (R. 3-6). The reported and the correct net income and tax liability as alleged in the indictment were as follows (R. 3-5):

| Year | Reported Income | Reported Tax | Correct Income | Correct Tax |
|---|---|---|---|---|
| 1947 Petitioner | $59,166 | $30,733 | $79,156 | $45,125 |
| 1947 Wife | 59,166 | 30,733 | 79,156 | 45,125 |
| 1948 Joint | 78,067 | 31,383 | 88,013 | 37,188 |

After a jury trial, petitioner was found not guilty on counts one and two and guilty on count three. (R. 1717.) On November 9, 1954, he was sentenced to imprisonment for one year and fined $5,000. (R. 17-18.) The Court of Appeals affirmed. (Pet. App. A1-A13.) A petition for rehearing was granted "limited to questions pertinent to the conflict or apparent conflict" with the decision in *Block* v. *United States*, 221 F. 2d 786, rehearing denied, 223 F. 2d 297. (Pet. App. A14.) The judgment of conviction was again affirmed upon the rehearing *en banc*.[1] (Pet. App. A14-A28, G.)

The sufficiency of the evidence to support the verdict is not challenged. The evidence may be briefly summarized as follows:

Petitioner operated a Pontiac automobile sales agency as sole proprietor from 1934 until February 28, 1948, and thereafter in corporate form. (R. 77, 1300.) The company dealt in both new and used cars. The latter were acquired in trades and were sold to individual buyers and in lots to used cars dealers. (R. 1393-1394.) During the period involved, automobiles were scarce and in demand. (R. 88-89, 272-273, 342-343, 377, 395-396, 438, 1000.) Petitioner's unreported

[1] Three judges dissented from the *en banc* majority on the grounds that the court was without jurisdiction to consider and pass upon but one of the issues raised by the appeal. (Pet. App. A22-28, G.) None of the dissenting judges voted to reverse the conviction.

income for 1948 (the year covered in count three of the indictment) consisted, principally, of cash side payments which he exacted upon the sale of used cars to dealers, and the gain which he realized upon the sale of "house" cars, that is, cars which were transferred from the company records to his individual account at cost. (R. 1189-1192.)[2]

The practice of exacting side payments in excess of the invoice price upon the sale of used cars to dealers was initiated by petitioner in 1946 and continued through 1948. At petitioner's direction, the dealers paid the invoice price of the used cars which was recorded on the company books by check and the side payment which was not recorded on the books in cash. (R. 1001-1022.) The Government's evidence of the receipt by petitioner of the cash side payments included the testimony and records of the used car dealers[3] and the testimony of petitioner's sales manager, Ansel R. Douglass (R. 997-1024, 1032-1119) and assistant sales manager, Maitland Cline (R. 1146-1172). As shown by the evidence, the cash side payments for the year 1948 aggregated $5,900. (R. 1189-1190.)[4] At the trial,

---

[2] There was also evidence that petitioner received cash side payments on the sale of new cars (R. 736-737, 859), and that the acquisition and sale at a profit of low value used cars were not recorded on the company books or reported in the tax returns and that the proceeds of such sales were turned over to petitioner in cash (R. 1190).

[3] Neal McNeil (R. 87-270); Justin Louis McNeil (R. 271-324); Jack Andrade (R. 324-341); Albert Quintal (R. 697-839); Harry Badger (R. 417-437); Joe Angel (R. 437-696); Henry Baiar (R. 377-394); Homer C. Taylor (R. 395-416).

[4] The side payments for the year 1947, covered by counts one and two on which petitioner was acquitted, aggregated $35,810. (R. 1189.)

petitioner categorically denied the receipt of any cash side payments on the sale of new or used cars. (R. 1316, 1347.)

It was stipulated (R. 1177) that the gain realized by petitioner on the sale of certain "house" cars in 1947 and 1948 was not reported in his returns. The amount of the unreported gain on the sale of "house" cars in 1948 was $9,549. (R. 1191.)

During cross examination of two prosecution witnesses, Douglass and Cline, petitioner's counsel, after eliciting from the witnesses the fact that they had testified before the grand jury, requested permission to inspect the minutes of their grand jury testimony as a basis for possible impeachment. No foundation was laid for the demand. The trial court denied the request on the ground that petitioner had failed to make any showing that the grand jury testimony would be impeaching; otherwise inspection of the minutes would be "a fishing expedition." (R. 1072, 1089-1090, 1174-1175.)

Petitioner offered in evidence, during direct examination of his accounting witness, Ernest W. Abbes, bimonthly issues of the Kelly Blue Book, a trade publication containing "average market" values of used cars. The stated purpose of the offer was to test the credibility of the used car dealers who had testified to making the side payments by showing that the prices which they testified they paid for the used cars were in excess of the "average" market values shown by the Blue Books. The Government objected to the evidence on the grounds that it was immaterial, irrelevant and

incompetent. The objection was sustained. (R. 1492-1499.)

The court instructed the jury, in part, as follows (R. 1703-1704):

> Now, the Government in this case has to show and convince you beyond a reasonable doubt before the defendant may be convicted that the defendant had income for the years 1947 and 1948, which was taxable, and that he intentionally and deliberately failed to report that income in his income tax return, and that he did so for the purpose, the deliberate purpose, of cheating or defrauding the United States out of taxes.
>
> That is the burden of proof that rests upon the Government under this statute.
>
> * * * * *
>
> Now, when we use the term "Wilful" in speaking of a violation of this statute, as used in this criminal statute and as used in most criminal statutes, we mean an act done with a bad purpose, without justifiable excuse, or stubbornly or obstinately or perversely. It may be used to characterize an act done without grounds for believing it is lawful, or conduct marked with completely careless disregard of whether one has a right to do that or not.
>
> If it appears that the defendant in this case filed an income tax return for the year 1947 or 1948, and you are convinced beyond a reasonable doubt that that was a false and fraudulent income tax return, and that it was filed with the wilful purpose of defrauding the United States of taxes, then the filing of the income tax return itself is a completed offense under the statute.

No objection was made to the charge at the trial. (R. 1714-1715.) Petitioner challenged the instructions on the element of wilfulness for the first time during oral argument in the court below. (Pet. App. A7.)

## ARGUMENT

This is not a case for certiorari. The judgment of conviction was affirmed by a three-judge panel of the Court of Appeals, and on rehearing before the entire nine-judge bench the conviction was again affirmed. Although dissenting views were expressed by some of the judges on the rehearing, their disagreement related not to the merits but only to the proper scope of the rehearing *en banc*. Petitioner does not seek review of the latter question. On the issues which he does present to this Court, none of the nine judges below agreed with petitioner's argument (though some took no position). None of the nine judges expressed even a doubt as to the correctness of the judgment of conviction. And the Government respectfully submits that the petition for certiorari fails to set forth adequate grounds for further review of this case.

1. Petitioner asserts (Pet. 23) that the "most disturbing feature of this case" is that the court below on "virtually identical records" applied one rule in the case of *Bloch* v. *United States*, 221 F. 2d 786, rehearing denied, 223 F. 2d 297, and another in this case; and that "if the ruling below stands, then assuredly 'Equal Justice Under Law' has become an empty phrase, high-sounding still, but, in its actual application, essentially devoid of content" (Pet. 32).

It appears to us that, stripped of the colorful bunting in which it is enveloped, petitioner's contention amounts to no more than this: that an appellate court, where it finds that a prior case involving "virtually identical" facts was erroneously decided, is nevertheless required by "equal justice under law" to follow it. In other words, the *Bloch* case must control the *Herzog* case because the records are "virtually identical", and it makes no difference that the *Bloch* case may have been erroneously decided. This is indeed a strange conception of *stare decisis*. It is not clear from the petition for certiorari whether petitioner's complaint against the decision below would have been satisfied had the Court of Appeals expressly overruled *Bloch*. But, in any event, the supervisory powers of this Court are surely not to be invoked, as petitioner spiritedly urges, where a court of appeals *en banc* overrules *sub silentio* an earlier case decided by a three-judge panel or indicates that the prior case will, in the classical phrase, be limited to its own facts.

Moreover, petitioner's contention in this regard entirely overlooks the nature of the so-called *Bloch* issue. In both cases, the trial court had given an instruction on wilfulness which, taken by itself, was of questionable validity. In both cases, the defendant had failed to make objection to the instruction, as required by Rule 30 of the Federal Rules of Criminal Procedure, which states: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." But Rule

52(b) also provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Naturally enough, the combination of Rules 30 and 52(b) has given rise to many cases in the lower federal courts where the question was whether an unassigned error was "so plain" or so affected "substantial rights" that it should be noticed on appeal. In dealing with such a question, the Government is in full accord with the approach taken in Judge Healy's opinion for the court below on rehearing *en banc* (Pet. App. 16-17):

> * * * These rules are not conflicting. Rather, they complement each other. Rule 52(b) was doubtless designed to take care of unusual or extraordinary situations where, to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings, the courts are broadly empowered to notice error of their own motion. The Rule is in the nature of an anchor to windward. It is a species of safety provision the precise scope of which was left undefined. Its application to any given situation must in the final analysis be left to the good sense and experience of the judges.

We are not sure whether petitioner objects to leaving this question "to the good sense and experience of the judges." In lieu of attempting to make an *ad hoc* determination based on all the facts as to where fairness and justice lie in the particular case, petitioner apparently would substitute a mechanical process of lining up, in double column charts, some of the facts of the particular case as compared with some of those of earlier cases. We suggest, however, that the super-

visory authority of this Court should not be exercised in order to compel the lower courts to adopt such a rigid process of dispensing justice.

In this case, whether the *Bloch* case was rightly or wrongly decided, it is evident that the Court of Appeals was amply justified in holding that, on the facts in this record, the instruction on wilfulness was not "plain error" which it was required to notice under Rule 52(b) even though it was neither objected to at the trial nor assigned as error on appeal. Petitioner concedes (Pet. 28) that the major issue at the trial was whether he received the side payments on the sale of cars as testified to by the Government's witnesses. Petitioner denied the receipt of any such payments and, in the light of the Government's evidence, his denial presented a clean-cut question of credibility which had a direct bearing on the element of wilfulness. As was observed by the court below (Pet. App. A19): "Thus, in respect of this major issue the instruction on willfulness was at worst purely innocuous."

2. There is no merit in petitioner's contention (Pet. 17-20) that the trial court erred in denying his request for leave to inspect the minutes of the grand jury testimony of two prosecution witnesses, Douglass and Cline, in order to obtain possible impeachment material. Grand jury testimony is ordinarily confidential. Its disclosure in connection with a judicial proceeding is within the sound discretion of the court and is proper only where the ends of justice are found to require it. Rule 6(e), Federal Rules of Criminal Procedure, *supra; United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233-234. Before the veil of secrecy is lifted

from grand jury proceedings, an adequate foundation should be laid and a showing made that the interests of justice require disclosure. *United States* v. *Perlman*, 247 Fed. 158, 161 (S.D. N.Y.). If a foundation must be laid for a demand for production of pre-trial statements of a witness in the hands of the prosecutor (*Gordon* v. *United States*, 344 U. S. 414, 418-419; *United States* v. *Krulewitch*, 145 F. 2d 76 (C.A. 2d), reversed on other grounds, 336 U. S. 440), *a fortiori* it is required as a condition precedent to a request for inspection of grand jury testimony. Here, no foundation whatever was laid for petitioner's request to inspect the grand jury testimony of Douglass and Cline, and it is clear from the record that the district court did not exceed its discretion in rejecting the request.

With respect to the witness Douglass, the request to inspect the minutes of his grand jury testimony, made during cross examination, was coupled with a request that the prosecution produce his sworn pre-trial statement to Treasury agents. No foundation was laid for either request. However, the Government voluntarily turned over to the defense the pre-trial statement. (R. 1072-1073.) After an unsuccessful attempt to show material differences between the witness' testimony and his pre-trial statement which was received in evidence (R. 1075-1086), petitioner renewed his motion to inspect the grand jury testimony (R. 1089). The court denied the request and stated (R. 1090): "You have to make some showing that it would be impeaching, otherwise it is a fishing expedition and would delay every criminal proceeding in federal court." With respect to the witness Cline, the request to inspect his

grand jury testimony appears to have been an afterthought. Petitioner recalled Cline to the stand, after he had been excused, for the sole purpose of requesting production of his pre-trial statement and permission to inspect his grand jury testimony. In his case, petitioner made no attempt to show any material discrepancies between his testimony and his pre-trial statement which was voluntarily produced by the Government. (R. 1173-1177.)

Petitioner's assertion (Pet. 11) that the trial testimony of both Douglass and Cline was impeached by their pre-trial statements to the Treasury agents is without support in the record. (R. 997-1119, 1146-1178, 1809-1847). In fact Cline's pre-trial statement was not even offered in evidence by petitioner. Furthermore, the testimony of both Douglass and Cline was corroborated in all material respects by the testimony and records of the used car dealers who had made the side payments and by the testimony of petitioner's office manager, Philip Smith.

As the court below pointed out (Pet. App. A7), "In the case at bar neither of the witnesses whose grand jury testimony the defendant sought to examine were questioned during cross-examination with respect to any contradictory statements they might have uttered before the grand jury, nor was it suggested to the court what contradictory statements the defendant hoped to find. There was no attempt to lay a foundation of any kind and the trial court did not err in denying the appellant's request." This Court recently observed that "in this country as in England of old the grand jury has convened as a body of laymen, free from technical

rules, acting in secret * * *." *Costello* v. *United States*, 350 U. S. 359, 362. And see *United States* v. *Johnson*, 319 U. S. 503, 513, where the Court stated that an intrusion "into the indispensable secrecy of grand jury proceedings—as important for the protection of the innocent as for the pursuit of the guilty—would subvert the functions of federal grand juries by all sorts of devices which some states have seen fit to permit in their local procedure, such as ready resort to inspection of grand jury minutes."

There is thus no question, as the court below recognized (Pet. App. A6-7), that in an appropriate case, where a proper foundation is laid, the historic secrecy of the grand jury can be breached, to the extent necessary to accomplish justice. But this case does not present, as petitioner asserts (Pet. 18), the question as to how much of a foundation must be laid in order to support a request for inspection of grand jury minutes. The question, rather, is whether a defendant is entitled to such inspection where *no* foundation is laid. If a simple request for inspection suffices in this case, it would suffice in every case.

3. Petitioner's contention (Pet. 20-23) that it was prejudicial error for the trial court to exclude the Kelley Blue Books is likewise without merit. The Blue Books could tend neither to prove nor disprove any fact in issue and, accordingly, were properly excluded as immaterial and irrelevant.

The market value of the used cars related to the side payments was not in issue, and petitioner's reliance upon *United States* v. *Werner*, 160 F. 2d 438 (C.A. 2d); *Wolcher* v. *United States*, 200 F. 2d 493 (C.A. 9); and

*Charles Hughes & Co.* v. *Securities and Exchange Com'n.*, 139 F. 2d 434 (C.A. 2d), is misplaced. As petitioner recognizes (Pet. 20), the basic issue of fact was whether the cash side payments in excess of invoice price were made to petitioner by the used car dealers. He denied the receipt of any side payments and claimed that the company invoices and books correctly reflected the sales price of the cars. (R. 1316, 1347.) The dealers testified and produced records to show that they had paid more for the cars than the amounts stated on petitioner's invoices and books. The excluded evidence which merely contained "suggested" (R. 858) or "average market values" of used cars (R. 1496-1497) could not tend to prove or disprove this fact.

Furthermore, even if market value had been an issue, the evidence showed that the Blue Books were not trustworthy evidence of value. There was testimony (R. 195-196, 858, 922-923), prior to the offer, that during the period in question when cars were scarce and in demand, the Blue Books were not an accurate gauge of market value. As the trial court pointed out prior to ruling on the offer (R. 1495): "The evidence was that nobody paid much attention to the Blue Book during that period of time." If the Blue Books did not reflect actual market value, they could not tend to discredit the testimony of the used car dealers. Clearly, the exclusion of the Blue Books was not prejudicial error.

## CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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July 1956.

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IN THE

# Supreme Court of the United States

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OCTOBER TERM, 1956

**No. 208**

J. A. HERZOG, *Petitioner*

v.

UNITED STATES OF AMERICA

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITIONER'S SUPPLEMENTAL MEMORANDUM

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UNITED STATES OF AMERICA

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITIONER'S SUPPLEMENTAL MEMORANDUM

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This memorandum is filed for the sole purpose of calling the Court's attention to a recent decision of the Second Circuit, *United States* v. *H. J. K. Theatre Corp. et al.*, decided on August 20, 1956.

That decision, set out in pertinent part in the Appendix hereto, *infra* pp. 1a-4a, is directly contrary to the decision of the court below in this case on the question of the right of a defendant to use a witness's Grand Jury testimony for purposes of impeachment. See the opinion below in Appendix A to the present petition, pp. A5-A7.

1. The Second Circuit held (p. 2a *infra*) that "The proper procedure is for the trial judge to read the Grand Jury minutes to determine whether the witness' trial testimony is contradictory; if it is, the judge should disclose to defendant the part of the witness' Grand Jury testimony which contradicts the trial testimony; and if not, and if the defendant so requests, the judge should seal the witness' complete Grand Jury testimony and make it part of the record on appeal."

The court below, on the other hand, held (Pet. App. A7) that "to ask a trial judge to inspect the transcript and then make known to the parties whether in his opinion *any* statements of a witness before the grand jury contradict *any* statements the witness made during the trial" is "Not only * * * a 'fishing expedition', but the judge is chumming the fish for the fisherman. For the judge to act as associate counsel in this manner is contrary to every concept of proper judicial functions."

It would be difficult to imagine more directly contradictory concepts of a federal trial judge's proper duty.

2. The Second Circuit also squarely held, rejecting the Government's contention to the contrary (in that case as well as here, see Br. Op. 12-15), that (note 7 of its opinion, p. 2a, *infra*) it is not necessary, "before a defendant may even inspect a witness' contrary Grand Jury testimony, he must lay a foundation similar to that required before he introduces into evidence prior inconsistent statements." Such a foundation, the Second Circuit went on to hold (*id.*), is required only when the contradictory statements are sought to be introduced in evidence.

Here again, this holding is directly in conflict with the views of the Ninth Circuit as to the foundation required before inspection of the Grand Jury minutes may be had (Pet. App. A6-A7), and is also at variance with the ruling of the First Circuit in *Scanlon* v. *United States*, 223 F. 2d 382, 385-386.

3. The Second Circuit also held, following its earlier decisions, that (p. 2a, *infra*) "where, as here, it is shown or alleged that the trial testimony of a witness against the defendant is contradictory of the witness' testimony before the Grand Jury, the rule in this circuit is that the defendant must be permitted to use the contradictory Grand Jury testimony to impeach the witness." This, of course, is likewise squarely contrary to the holding of the Ninth Circuit in this case (Pet. App. A5-A7).

4. If the Second Circuit's rule, that it is a sufficient basis for inspection of a witness' Grand Jury testimony that "it is shown or alleged" that such testimony is contradictory (*infra*, p. 2a), is to be regarded as law, then it is unnecessary to examine the Government's argument here (Br. Op. 14) that "Petitioner's assertion (Pet. 11) that the trial testimony of both Douglass and Cline was impeached by their pre-trial statements to the Treasury agents is without support in the record."

Petitioner set out in Appendix D to the petition herein (Pet. App. A33-A36) the significant respects in which both Douglass and Cline had already been impeached prior to his request for inspection of their Grand Jury testimony. If, under any view of the case, that question must be resolved, then we are confident that the record references collected in Appendix D amply support petitioner's assertion and demonstrate

as well that the Government's statement to the contrary constitutes an instance of the triumph of advocacy over accuracy.

5. The Second Circuit's *H. J. K. Theatre Corp.* decision (*infra,* pp. 1a-4a) underscores what the Circuit Justice said in February 1955 when he admitted the present petitioner to bail pending appeal (99 L. Ed. at 1303; 75 S. Ct. at 353):

> "* * * Herzog's request for inspection of the grand jury minutes would have been treated differently in New York than it was in California. Which is the better way of handling the matter, or whether there is still another which is to be preferred, is a considerable question in the administration of justice."

We accordingly urge that the *H. J. K. Theatre Corp.* case, which demonstrates the continuing importance of that question, additionally emphasizes the need for reviewing the contrary ruling below in the present cause.

Respectfully submitted.

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SEPTEMBER 1956.

**APPENDIX**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 392—October Term, 1955.

(Argued June 8, 1956 Decided August 20, 1956.)

Docket No. 24001

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UNITED STATES OF AMERICA, *Appellee*,

v.

H. J. K. THEATRE CORPORATION, JEANNE ANSELL, and IRVING A. ROSENBLUM, *Appellants*.

* * * * * *

Before: FRANK, HINCKS and WATERMAN, *Circuit Judges*.

* * * * * *

FRANK, *Circuit Judge*:

* * * * * *

3. Rosenblum's only additional contention is that the trial judge erred in restricting his attorney's access to the Grand Jury testimony of Ansell and in limiting the use of the disclosed Grand Jury testimony in his cross-examination of Ansell. After the Government had used Miss Ansell's Grand Jury testimony to impeach her,[6] Rosenblum's counsel asked to see the remainder of Ansell's Grand Jury testimony in order to impeach her. We do not think that he was entitled to have access to all of her testimony.

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[6] It is suggested that the Government, by using a portion of the Grand Jury minutes to impeach Ansell, waived its privilege to keep the balance secret. See *United States* v. *Krulewitch*, 145 F. 2d 76, 79 (C. A. 2); *United States* v. *Beckman*, 155 F. 2d 580, 584 (C. A. 2). We leave that question open.

However, where, as here, it is shown or alleged that the trial testimony of a witness against the defendant is contradictory of the witness' testimony before a Grand Jury, the rule in this circuit is that the defendant must be permitted to use the contradictory Grand Jury testimony to impeach the witness. The proper procedure is for the trial judge to read the Grand Jury minutes to determine whether the witness' trial testimony is contradictory; if it is, the judge should disclose to defendant that part of the witness' Grand Jury testimony which contradicts the witness' trial testimony; and if not, and if the defendant so requests, the judge should seal the witness' complete Grand Jury testimony and make it part of the record on appeal.[7]

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[7] *U. S.* v. *Alper*, 156 F. 2d 222, 226 (C. A. 2); *U. S.* v. *Lebron*, 222 F. 2d 531, 536 (C. A. 2); *U. S.* v. *Cohen*, 145 F. 2d 82, 92 (C. A. 2); *U. S.* v. *Krulewitch*, 145 F. 2d 76, 78 (C. A. 2); *U. S.* v. *De Normand*, 149 F. 2d 622, 625-626 (C.A. 2); *U. S.* v. *Beckman*, 155 F. 2d 580, 583-584 (C. A. 2).

The Government contends that *Remington* v. *United States*, 191 F. 2d 246, 261 (C. A. 2) should be construed to hold that, before a defendant may even inspect a witness' contradictory Grand Jury testimony, he must lay a foundation similar to that required before he introduces into evidence prior inconsistent statements. This interpretation of *Remington* we think is not warranted. Since the *Krulewitch* case, *supra*, which the Court cited in *Remington*, held precisely the opposite, and since the *Cohen* case, *supra*, also cited by the Court, contains no indication of such a requirement, we are loath so to interpret *Remington* so as to require this foundation. No other case in this circuit has imposed this additional requirement for the mere disclosure (as opposed to use as evidence) of contradictory Grand Jury or other privileged testimony. Of course, if a defendant seeks to introduce the contradictory statements in evidence, he must lay a proper foundation. McCormick, Evidence (1954), Section 37.

In any event, in this case, the trial judge made it impossible for Rosenblum's attorney to lay the foundation apparently required by *Remington*, since he very clearly ruled that Rosenblum's attorney was to limit his cross-examination concerning Ansell's Grand Jury testimony to only the two matters touched upon by the Government in its cross-examination of Ansell.

The trial judge in this case did not follow this procedure. Instead, he ruled that he would read into the record only that portion of Ansell's Grand Jury testimony which related to two matters on which the Government had cross-examined her, i.e., (1) her claim that she thought that the tax returns filed were only for part payment, and (2) the monthly tax summaries. However, the testimony actually read into the record also revealed (3) that Rosenblum had set up a separate tax account, and (4) that Ansell had given the tax figures to Rosenblum who made out the tax returns. In addition, Block [Rosenblum's attorney, who had been attorney for both Ansell and Rosenblum at the time Ansell appeared before the Grand Jury] had a copy of a prepared statement that Ansell had read to the Grand Jury.

The trial judge also ruled that he would limit Block's cross-examination of Ansell with respect to her Grand Jury testimony to only the two matters brought out by the Government in its cross (i.e., points (1) and (2) *supra*). He so ruled after Ansell's counsel objected to the cross-examination of his client by Block (who had represented her at the time of the Grand Jury hearing).

We think that Rosenblum's attorney was entitled to have all of Ansell's contradictory Grand Jury testimony read into the record and that he was entitled to cross-examine her concerning this testimony free from the limitations imposed by the trial judge. Statements made to a Grand Jury are not confidential communications which come within the attorney-client privilege. McCormick, *supra*, Sections 93, 95; 8 Wigmore, Evidence, Section 2311. The modern justification of the privilege is that it encourages full disclosure by a client to his lawyer and thereby promotes the interest of justice. 8 Wigmore, *supra*, Section 2291; McCormick, *supra*, Section 91. This purpose is not furthered by restricting an attorney's access to and use of Grand Jury testimony by a former client.

However, after examining the Grand Jury testimony by Ansell, which was sealed and made part of the record on appeal, and after comparing it with the trial testimony, we think that all the points in Ansell's Grand Jury testimony, which contradicted her trial testimony and which supported Rosenblum's defense, were adequately brought out at the trial. * * * We are satisfied that the unrevealed portion of Ansell's Grand Jury testimony contained nothing which would have added weight to the impeachment of her trial testimony touching Rosenblum, impeachment already accomplished by that portion of her Grand Jury testimony which was read to the trial jury at the Government's behest. Thus the effect of the rulings made was not to leave her trial testimony against Rosenblum unimpeached. When her trial testimony as to a particular fact had been impeached by one passage in her prior testimony, we think it lay within the trial court's discretion to prevent, as unduly time-consuming and unimportantly cumulative, an inspection of, and cross-examination on, other passages in her previous testimony given as to the same matters on the same occasion before the Grand Jury. Indeed, the verdict against Ansell imports that the jury rejected her trial testimony to the effect that Rosenblum was solely to blame. This accomplished, further impeachment of her trial testimony could scarcely have affected the verdict against Rosenblum.

*Affirmed.*

# In the Supreme Court of the United States

OCTOBER TERM, 1956

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No. 208

J. A. HERZOG, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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This memorandum is filed in response to Petitioner's Supplemental Memorandum, which invited the Court's attention to the decision of the Court of Appeals for the Second Circuit in *United States* v. *H. J. K. Theatre Corp. et al.*, decided August 20, 1956.

Petitioner argues, with respect to the question whether the trial court erred in denying petitioner's request to inspect the minutes of the grand jury testimony of two Government witnesses (the first question presented by the petition for certiorari), that the decision of the Second Circuit in the *H. J. K. Theatre Corp.* case is in conflict with that of the Ninth Circuit

in the instant case. It is certainly true that, taken literally, the language of Judge Frank's opinion (Pet. Supp. Memo. 2a) seems to announce a general rule in the Second Circuit that the mere unsupported allegation that a witness's trial testimony is contradicted by the testimony he gave before the grand jury suffices, without more, to require the trial judge to read the grand jury's minutes to determine whether the alleged inconsistency in fact exists. If that is now the rule in the Second Circuit, it undoubtedly represents a change from what was generally understood, we believe, to be the rule in that circuit as well as in other circuits. See Brief in Opp. pp. 12–15; and cf. cases cited in fn. 7 of Judge Frank's opinion (Pet. Supp. Memo 2a). To that extent there is a conflict between the approach taken by the Second Circuit in the *H. J. K. Theatre Corp.* case and that expressed by the Ninth Circuit in the opinion below (App. A to petition for certiorari, pp. A6–A7):

> Surely there is at least as great a need for laying a foundation before invading the secrecy of grand jury proceedings, as would ordinarily be required before permitting the examination of statements and reports in the possession of the prosecutor. A trial court unquestionably has the power, under Rule 6 (e) of the Federal Rules of Criminal Procedure, to order grand jury proceedings transcribed and produced for inspection by the defendant but such power should be exercised only where there is a clear showing that the ends of justice require it. * * *
>
> * * * The person requesting the inspection should be required to specify the particular

statements he is seeking for impeachment purposes. It is one thing to ask a trial judge to inspect the transcript of grand jury proceedings to determine whether a witness there testified he spent the month of July in Alaska, or that he had a gun in his possession on a certain occasion, or that he rode on a white horse in a parade. It is an entirely different matter to ask a trial judge to inspect the transcript and then make known to the parties whether in his opinion *any* statements of a witness before the grand jury contradict *any* statements the witness made during the course of the trial. Not only is the latter course a "fishing expedition", but the judge is chumming the fish for the fisherman. For the judge to act as associate counsel in this manner is contrary to every concept of proper judicial functions.

We think it appropriate to add, however, that in the instant case the court below explicitly put to one side the question whether the trial judge should have himself inspected the grand jury testimony (*id.*):

> * * * In the instant case the trial judge was not requested to inspect the grand jury testimony. Appellant's request was that the testimony be produced for the appellant's (not the trial judge's) inspection. We are not to be understood as saying that it would have been error to refuse such a request had it been made. * * *

In the case at bar neither of the witnesses whose grand jury testimony the defendant sought to examine were questioned during cross-examination with respect to any contradictory statements they might have uttered before the

grand jury, nor was it suggested to the court what contradictory statements the defendant hoped to find. There was no attempt to lay a foundation of any kind and the trial court did not err in denying the appellant's request.

Moreover, in the *H. J. K. Theatre Corp.* case the Court of Appeals pointed out that the Government had itself used the witness's grand jury testimony to impeach her, prior to defendant's request to see the remainder of her grand jury testimony. Although the Second Circuit expressly left open the question whether the Government had thereby "waived its privilege to keep the balance [of her grand jury testimony] secret" (Pet. Supp. Memo 1a, fn. 6), a distinction might be drawn between such a situation and the one in the instant case, where the Government had not itself used the grand jury minutes.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*

OCTOBER 1956.

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